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Between Description and Prescription: Law, Wittgenstein, and Constitutional Faith

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**BETWEEN DESCRIPTION AND PRESCRIPTION:
LAW, WITTGENSTEIN, AND CONSTITUTIONAL FAITH**

*Gregory Brazeal**

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ABSTRACT: The occasions on which a judge or legal scholar has peered into the depths of the Constitution and found, to her surprise, that the Constitution requires the opposite of her ideological preferences, are extremely rare. Yet judges and scholars continue to present their conclusions as the product of ideologically neutral reasoning, while often criticizing the ideological bias in the reasoning of their opponents. A Wittgensteinian perspective on the nature of legal discourse can shed light on this puzzlingly persistent state of affairs. Legal discourse, including constitutional argument, is partly defined by the blending of descriptive reasoning about what the law is with prescriptive reasoning about what the law ought to be. To reach a legal conclusion based on a blend of descriptive and prescriptive reasoning, and to phrase this conclusion as purely descriptive, as legal actors habitually do, is not to violate the rules of legal discourse, but to abide by them. Taking this conception of legal discourse as a starting point, the Article extends Sanford Levinson’s analogy between U.S. constitutionalism and religious faith. Just as we can distinguish at least three

* Cornell University, Ph.D., English, anticipated 2018; Harvard Law School, J.D., *magna cum laude*, 2010. I am grateful to Eric Berger, Richard Fallon, Duncan Kennedy, Sanford Levinson, Lewis Sargentich, Pierre Schlag, Joseph Singer, David Skover, and Mark Tushnet for responses to an earlier draft. I would like to dedicate this Article to the memories of two teachers who shaped its arguments: Gordon Baker, who introduced me to the later Wittgenstein, and Richard Rorty, who introduced me to American philosophy.

attitudes toward a religious belief—fundamentalism, atheism, and non-fundamentalist faith—so we can distinguish at least three analogous approaches to legal and constitutional discourse. Jack Balkin’s Constitutional Redemption illustrates the often neglected possibility of a constitutional faith without fundamentalism.

I. INTRODUCTION

When progressive judges and legal scholars scrutinize the Constitution, nearly all discover largely progressive meanings, while conservative judges and legal scholars tend to discover correspondingly conservative meanings. The occasions on which a judge or legal scholar has peered into the depths of the Constitution and found, to her surprise, that the Constitution requires the opposite of her ideological preferences, are extremely rare.¹

These observations should by now be uncontroversial. The role of personal values in judging has been a commonplace for well over a century, as legal realists have repeatedly and persuasively demonstrated the indeterminacy of the doctrinal materials that judges habitually present as the determinants of the outcome of a case.² The evidence that judges fill this indeterminacy in part based on their personal ideological preferences is no longer merely anecdotal. Decades of empirical research by political scientists and other scholars support what the realists have always claimed.³ The case for the role of judicial ideology in constitutional adjudication is especially strong.⁴ Even those who defend the

¹ For an expression of these general observations with an enduringly clever title, see Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 358 (1981) (criticizing prominent legal scholars for believing that “the constitution is essentially perfect” at least in the sense of guaranteeing “most equality and autonomy values which the commentators think a twentieth century Western liberal democratic government ought to guarantee”). For one of the rare examples of a legal scholar discovering ideologically unwelcome materials in the Constitution and refusing to evade or downplay their significance, see Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989) (concluding that the Second Amendment “may be profoundly embarrassing” to “those of us supporting prohibitory regulation” of firearms and also “committed to zealous adherence to the Bill of Rights”).

² See Brian Leiter, *In Praise of Realism (and Against “Nonsense” Jurisprudence)*, 100 GEO. L.J. 865, 872 (2012).

³ See, e.g., LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES* (2013); Keith E. Whittington, *Once More Unto the Breach: Postbehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 620 (2000) (noting that “several decades of research have helped provide empirical support for the kind of claims about legal indeterminacy and judicial politicization that the legal realists only asserted”).

⁴ In the words of Judge Richard Posner, “[t]he evidence of the influence of policy judgments, and hence of politics, on constitutional adjudication in the Supreme Court lies everywhere at hand.” Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 46 (2005). I note that I will use the term “ideology” throughout this Article not in any of the sophisticated senses associated with, for example, Marx or the Frankfurt School, but simply as shorthand for the defining political, cultural, and economic views of one or another political grouping. Ideological

possibility of formalist approaches to the law often acknowledge the accuracy of legal realism as a description of the current practice of constitutional interpretation on the Supreme Court.⁵

Likewise, the powerful role of ideological preferences in constitutional law scholarship should not come as a surprise. The words of Paul Brest over three decades ago remain true today: most of the claims of constitutional law scholars “are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good.”⁶ This includes constitutional theory, which has engaged in a predictable, decades-long dance with the ideological course of constitutional adjudication. As Barry Friedman has recounted in persuasive detail, “[w]hen the ideological valence of Supreme Court decisions shifts, constitutional theorizing about judicial review tends to shift as well.”⁷ During the conservative *Lochner* era on the Supreme Court, progressive judges, scholars, and activists decried aggressive judicial review, and some called for taking the Constitution back from the courts by ending or radically curtailing judicial review of federal legislation.⁸

preferences can be distinguished from mere partisan (party-based) preferences. For the purposes of this Article, the most important ideological split in the contemporary United States remains the one between Left and Right, that is, between “progressives” (or “liberals”) who, very generally speaking, favor interfering in traditional social and economic hierarchies to promote greater equality between groups; and “conservatives” who, again very generally speaking, oppose such liberal interventions, often in the name of individual freedom or, more controversially, the defense of the hierarchies themselves. When judges and scholars accuse one another of bias, the accusation is almost always made across, and in terms of, such political-ideological lines.

⁵ See, e.g., ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 32, 37 (Amy Gutmann ed., 1997) (lamenting that the Supreme Court so often disregards the logic of its precedents “in order that the Constitution might mean what it *ought* to mean,” and that “[t]he American people have been converted to belief in The Living Constitution, a ‘morphing’ document that means, from age to age, what it ought to mean”).

⁶ Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981). As in the case of adjudication, so in the case of legal scholarship, the evidence of the correlation between ideological preference and interpretive outcomes is no longer merely anecdotal. See Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship* (Coase-Sandor Inst. for Law and Econ., Working Paper No. 696, 2014), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2376&context=law_and_economics.

⁷ Barry Friedman, *The Cycles of Constitutional Theory*, LAW & CONTEMP. PROBS., Summer 2004, at 149, <https://scholarship.law.duke.edu/lcp/vol67/iss3/9/>; accord Keith E. Whittington, *Herbert Wechsler’s Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509, 509–17 (2000).

⁸ See Brian Z. Tamahana, *The Progressive Struggle with Courts: A Problematic Asymmetry* 1 (Washington Univ. in St. Louis Sch. of Law Legal Studies Research Paper Series, Working Paper No. 14-05-06, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2439395 (citing J. Patrick White, *Progressivism and the Judiciary: A Study of the Movement for Judicial Reform, 1901–1917* (1957) (unpublished Ph.D. dissertation, University of Michigan)) (noting that

When the Supreme Court turned in more progressive directions during the Warren Court era, progressive legal scholars warmed to the notion of judicial review and sought ways to defend it as principled and democratic.⁹ As the Supreme Court has once again veered in a more conservative direction, calls by progressive legal scholars for an end to judicial supremacy have returned.¹⁰

Indeed, one of the only places where one can find a denial of the role of ideological preference in constitutional adjudication and scholarship is in judges' and legal scholars' protestations of their own lack of ideological bias. As Judge Posner notes, "most judges are cagey, even coy, in discussing what they do. They tend to parrot an official line about the judicial process (how rule-bound it is), and often to believe it, though it does not describe their actual practices."¹¹

"[p]rogressives at the turn of the twentieth century . . . urged a host of reforms to trim judicial power," including, for example, "elimination of judicial review"; Friedman, *supra* note 7, at 157 (stating that from 1890 to 1937, "[p]rogressives were troubled" by judicial review, while "conservatives admired its preservationist and anti-democratic character"). Justice Holmes' Thayerian dissent in *Lochner* illustrates the progressive hostility to aggressive judicial review. See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (proposing that legislation should be upheld "unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law").

⁹ See Friedman, *supra* note 7, at 157–58 (noting that after 1937, "[a]ll of the sudden, liberals were for judicial review, though admittedly angst-ridden about how to justify it"); Whittington, *supra* note 7, at 514 (noting that constitutional theorists were "substantively more sympathetic to the actions of the Warren Court" and thus focused on "legitimat[ing] activist judicial review").

¹⁰ See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348 (2006); see also SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 29 (2011) [hereinafter LEVINSON, FAITH] (raising the possibility of a "protestant" constitutionalism that denies the Supreme Court "is the dispenser of ultimate interpretation"). Cass Sunstein's advocacy of "judicial minimalism" can also be seen as a way of preserving Warren Court gains against erosion by more conservative justices. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999). The more minimalist our relatively conservative Supreme Court is today, the less it will move constitutional doctrine away from the progressive (and decidedly non-minimalist) achievements of earlier Courts. *Id.* Some progressive scholars working in the era of the Rehnquist and Roberts Courts have questioned whether the Constitution deserves our fidelity at all. See, e.g., LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997).

¹¹ RICHARD A. POSNER, *HOW JUDGES THINK* 2 (2008). The default rhetorical mode of constitutional adjudication remains as Justice Louis Brandeis is said to have described Supreme Court decision making in general: even "if you're only fifty-five percent convinced of a proposition, you have to act and vote as if you were one hundred percent convinced." Mark Tushnet, *"I Couldn't See It Until I Believed It": Some Notes on Motivated Reasoning in Constitutional Adjudication*, 125 HARV. L. REV. F. 1, 4 n.13 (2011) (quoting Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149, 1188 n.235 (2010)); accord Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 213 (1990) (describing the "rhetoric of inevitability" in judicial writing). For the continuing prevalence of a rhetoric of

Constitutional law scholars whose antennae are subtly attuned to the presence of unstated ideological presuppositions in the opinions of judges and other scholars routinely insist upon the neutrality of their own interpretations.¹²

In sum, the usual rhetoric of constitutional scholarship and adjudication asks us to believe, as Louis Michael Seidman observes with appropriate skepticism,

that it is no more than coincidence that the supposedly good faith and politically neutral effort of both sides to understand the same eighteenth-century text leads each side to read it in a fashion that embodies its own contestable political programs while delegitimizing the programs of its adversaries. Or, more precisely, we are asked by each side to believe that its disinterested reading leads to this result, while the other side's manipulation of text and history amounts to a cynical, politically motivated effort to distort the Constitution's true meaning.¹³

What are we to make of this widely acknowledged, empirically confirmed, yet routinely unaddressed state of affairs? Our judges appear to be politically biased in their constitutional adjudication, despite their rhetoric of rule-bound neutrality, and our constitutional scholars' conclusions appear distorted by political considerations in a way that conflicts with scholarly standards elsewhere in the university. How can we not be scandalized?

This Article takes a novel approach to the role of ideological reasoning in constitutional adjudication and legal scholarship. Part I begins by proposing a reconceptualization of the nature of legal discourse, drawing on Ludwig Wittgenstein's discussion of religious belief in his *Lectures on Religious Belief*.¹⁴ In the *Lectures*, Wittgenstein suggests that we should not be misled by superficial similarities between religious beliefs and ordinary beliefs, such as belief in

certainty in constitutional adjudication, see Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667 (2015). Berger's advocacy of the use of a "more compromising constitutional discourse" that honestly recognizes the indeterminacy of constitutional interpretation through the use of "[m]ore equivocal language" roughly equates, in this Article's terms, to the argument that more constitutional adjudication should be produced from a stance of candid constitutional atheism. *Id.* at 751, 757; see *infra* Part IV (discussing this argument).

¹² See *infra* Section III.B. Even the legal realists, despite their concentrated awareness of the role of personal political preferences in legal interpretation, sometimes seemed to be blind to the role of those preferences in policy decisions. The realists "embrace[d] wholeheartedly the idea that judges make law," rather than simply finding it through deduction from the legal materials, but "often made it seem as if judges could make . . . policy and precedential judgments without injecting personal political commitments into their decisionmaking." Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 502 (1988). Singer also suggests that it remained "explosive," at least in 1988, "to claim that law is a form of politics." *Id.* at 467.

¹³ SEIDMAN, *supra* note 10, at 7.

¹⁴ See *infra* note 25.

scientific facts.¹⁵ Closer attention to the reasons that religious believers offer for their beliefs and the attitude they adopt toward their beliefs suggests that referring to religious beliefs as “beliefs” may obscure as much as it reveals. A believer who affirms a religious claim and perhaps even defines her life around it may, for example, acknowledge that she lacks ordinary evidence for the claim and deny that any amount of evidence could dissuade her.

Extending Wittgenstein’s elusive remarks, Part I suggests that there are at least three possible attitudes toward a religious claim. First, there is fundamentalism, which insists that the claim is not only true, but *literally* true, and true in the same way as any other descriptive claim, including the claims of science. Fundamentalism denies that one’s faith *is* a faith. Second, there is atheism, which agrees with fundamentalism that there is no significant difference between religious claims and scientific claims, but concludes on this basis that religious claims are invalidated by the evidence and therefore simply false. Finally, there is faith without fundamentalism, which recognizes differences between a religious claim and a scientific claim and maintains faith in the religious claim despite its lack of scientific support. Only the non-fundamentalist recognizes the possibility that religious belief might constitute its own “form of life” (to use a Wittgensteinian term of art) with its own distinct norms.

Part II then draws a comparison between legal discourse and religious belief. As in the case of religious belief, it is easy to be misled by the superficial features of legal discourse into believing that the statements of the law made by attorneys and judges are no different from any other descriptive statements. Indeed, legal conclusions appear, when viewed in isolation, to be purely descriptive. They present themselves simply as statements of what the law *is*, not what the speaker believes the law *should be*. Closer attention to the contexts in which these legal conclusions are asserted, however, shows that they are a different breed: an undifferentiated amalgam of description and prescription.

Legal conclusions are fundamentally different from purely descriptive assertions about the law. The social practice of making legal assertions is distinguished by the intermingling of the descriptive and the prescriptive, of assertions about what is and assertions about what should be. To base a legal conclusion regarding what the law is in part on one’s view of what the law should be is not a violation of the rules governing this social practice. Rather, it is to abide by the rules. Accordingly, to say that legal conclusions incorporating prescriptive considerations are invalid for that reason is to misunderstand what it means to make a legal assertion, just as one would misunderstand religious faith if one were to say that a religious claim can only be a valid object of faith if it is based on sufficient scientific evidence.

Based on this background, Part III turns to claims about the contents of the U.S. Constitution. Statements made by judges and advocates about constitutional meaning are a subset of legal conclusions. As with all legal

¹⁵ See *infra* Part I.

conclusions, it is proper for constitutional interpretations to be based in part on the speaker's views of what the Constitution *should* mean. This is simply the way that constitutional interpretation, as a type of *legal* discourse, works. The blending of description and prescription is part of the "form of life" of making a legal assertion about the contents of the Constitution, as opposed to a purely descriptive assertion.

Not all interpreters of the Constitution adopt the same attitude toward their legal claims. Echoing the tripartite distinction above, we can distinguish at least three attitudes to any given interpretation of constitutional meaning. "Constitutional fundamentalism" assumes that constitutional interpretations are purely descriptive claims. Whether true or false, accurate or inaccurate, they are descriptive claims about what is the case, not prescriptive claims about what should be the case. To adopt a fundamentalist attitude toward an interpretation with which one agrees is to insist that the interpretation is simply the most descriptively accurate interpretation available, and that this descriptive accuracy is a sufficient basis for adopting the interpretation over its competitors—when, in fact, the interpretation depends for its appeal in part on considerations about what should be the case, and someone with different prescriptive preferences from one's own could very well arrive at a conflicting interpretation that would be no less well-supported by descriptive reasons. Just as the religious fundamentalist insists that science supports her religious beliefs, and thus refuses to see her faith *as* faith, the constitutional fundamentalist insists that purely descriptive reasoning supports her legal conclusions about the Constitution's meaning, and thus refuses to see her legal conclusions *as* legal conclusions.

"Constitutional atheism" accepts the fundamentalist premise that constitutional interpretations can and should be judged solely by their descriptive accuracy, but finds that nearly all contested constitutional interpretations fail by this standard—usually because they assert a determinate conclusion where none exists. To adopt an atheist attitude toward a constitutional interpretation is to deny the descriptive accuracy of the interpretation without believing that some other, competing interpretation could succeed where the first fails. It is to see the entire enterprise as hopeless from the start, just as the religious atheist views the search for scientific support for miracles or deities as hopeless regardless of the identity of the deity or the nature of the miracle under discussion.

Finally, a "constitutional faith without fundamentalism" rejects the shared fundamentalist-atheist notion that constitutional interpretations can and should be judged solely by their descriptive accuracy. To adopt an attitude of non-fundamentalist constitutional faith toward a constitutional interpretation is to recognize that purely descriptive considerations may be insufficient to demonstrate the superiority of the interpretation over its alternatives, to acknowledge the role of prescriptive reasoning in one's preference for the interpretation, but to persist in believing that the interpretation is the best available, and to remain committed to it.

II. RELIGIOUS FUNDAMENTALISM AND LEGAL FUNDAMENTALISM

A. Religious Beliefs Versus Ordinary Beliefs

The aspect of religious fundamentalism that interests me here is the fundamentalist's insistence that the claims in her sacred religious texts are not only true, but *literally* true, and even supported by science.¹⁶ They are true in the same way as scientific claims, or claims in a scholarly work of history, or everyday empirical claims about what is around us. For a fundamentalist of this kind who happens to be Jewish or Christian, the story of Moses parting the Red Sea is simply, ordinarily true in the sense that if you were able to travel back in time with a video camera, you could record the event, return, and broadcast it on the nightly news. Indeed, the most significant difference between journalism and the Book of Exodus, in the eyes of the fundamentalist, is that the latter is more reliably true, because God has guaranteed its accuracy. Religious fundamentalism, in this sense, is defined by the denial of differences between the kinds of claims made by religion and the kinds of claims made by science and the practices and assumptions surrounding both.

The term "fundamentalism" has not always been a pejorative label applied by secular rationalists to their religious opponents. It was developed by Biblical literalist Protestants early in the twentieth century to refer to themselves. They derived the label from the title of *The Fundamentals: A Testimony to the Truth*, a series of paperbacks published between 1910 and 1915 that propounded literalist Protestant views.¹⁷ Although *The Fundamentals* attracted little attention

¹⁶ On fundamentalism in the United States, see generally GEORGE M. MARSDEN, *FUNDAMENTALISM AND AMERICAN CULTURE* (2d ed. 2006). For a broader but more polemical introduction, see KAREN ARMSTRONG, *THE BATTLE FOR GOD: A HISTORY OF FUNDAMENTALISM* (2001). Armstrong argues that most religious movements that have been called "fundamentalist" arose as responses to the perceived threat of modernity:

[Fundamentalist] theologies and ideologies are rooted in fear. The desire to define doctrines, erect barriers, establish borders, and segregate the faithful in a sacred enclave where the law is stringently observed springs from that terror of extinction which has made all fundamentalists, at one time or another, believe that the secularists were about to wipe them out. The modern world, which seems so exciting to a liberal, seems Godless, drained of meaning, and even satanic to a fundamentalist.

Id. at 368; accord MALISE RUTHVEN, *FUNDAMENTALISM: A VERY SHORT INTRODUCTION* 20 (2007) (noting that fundamentalism "at its broadest . . . may be described as a religious way of being that manifests itself in a strategy by which beleaguered believers attempt to preserve their distinctive identities as individuals or groups in the face of modernity and secularization"). The most comprehensive English-language collection of scholarly treatments of religious fundamentalism can be found in the five volumes published by the Fundamentalism Project, culminating in 5 *FUNDAMENTALISMS COMPREHENDED* (Martin E. Marty & R. Scott Appleby eds., 2004).

¹⁷ See ARMSTRONG, *supra* note 16, at 171; MARSDEN, *supra* note 16, at 118–19 (describing the origins of the term "fundamentalist"); RUTHVEN, *supra* note 16, at 21–22; see generally R. A. TORREY, *THE FUNDAMENTALS: A TESTIMONY TO THE TRUTH* (R.A. Torrey et. al. eds., 2013).

at the time of publication,¹⁸ the books provide a useful illustration of the fundamentalist denial of distinctions between religious and scientific belief. According to George Marsden, the author of a leading study of American religious fundamentalism, “[t]he crucial issue” throughout *The Fundamentals* was arguably “the authority of God in Scripture in relation to the authority of modern science, particularly science in the form of higher criticism of Scripture itself.”¹⁹ “Higher Criticism” was the attempt to apply “the new techniques of literary analysis, archaeology, and comparative linguistics to the Bible, subjecting it to a scientifically empirical methodology,” with the inevitable result that many Biblical tales were discovered to be “almost certainly not historical.”²⁰

One author of *The Fundamentals* attempted to argue, for example, that a truly scientific approach to the Bible demonstrated that Christianity was founded on “historically proven fact.”²¹ “[T]rue science does not start with an *a priori* hypothesis that certain things”—such as the miracles in the Bible—“are impossible, but simply examines the evidence to find out what has actually occurred.”²² Marsden refers to the authors of *The Fundamentals* as “champions of science and rationality.”²³ They framed their objections to scholarly criticisms of the Bible’s historical accuracy as defenses of *true* science and historical criticism against its “illegitimate, unscientific and unhistorical use” by speculative, “hypothesis-weaving . . . German theological professor[s].”²⁴

Ludwig Wittgenstein provides a helpful way of thinking about religious belief in general and religious fundamentalism in particular in his *Lectures on Religious Belief* (“the *Lectures*”).²⁵ In a manner characteristic of his later philosophy,²⁶ Wittgenstein avoids asserting a contestable theory of the nature of

¹⁸ See ARMSTRONG, *supra* note 16, at 171; MARSDEN, *supra* note 16, at 119.

¹⁹ MARSDEN, *supra* note 16, at 120.

²⁰ ARMSTRONG, *supra* note 16, at 95.

²¹ MARSDEN, *supra* note 16, at 121.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 120–21 (quoting R. A. TORREY, 1 THE FUNDAMENTALS: A TESTIMONY TO THE TRUTH 19 (R.A. Torrey et. al. eds., 2013)).

²⁵ See Ludwig Wittgenstein, *Lectures on Religious Belief*, in LECTURES AND CONVERSATIONS ON AESTHETICS, PSYCHOLOGY AND RELIGIOUS BELIEF 53–72 (Cyril Barrett ed., 1966) [hereinafter Wittgenstein, *Lectures*]. I note that the *Lectures* were not transcribed by Wittgenstein, but are instead a posthumous collection of notes taken by his students during a course on belief offered around 1938. See *id.* at vii. For convenience, I will refer to the *Lectures* throughout this Article as though they accurately reflect Wittgenstein’s views.

²⁶ For an accessible introduction to the “therapeutic” understanding of Wittgenstein’s later philosophy adopted in this Article, see Robert J. Fogelin, *Wittgenstein’s Critique of Philosophy*, in THE CAMBRIDGE COMPANION TO WITTGENSTEIN 34 (Hans Sluga & David G. Stern eds., 1996). Fogelin’s article introduces some of the central themes of Wittgenstein’s later philosophy, partly by emphasizing the importance of the logical imperfection (that is, indeterminacy, underdetermination, and inconsistency) of the rules governing our use of terms in a natural

religious belief in the *Lectures*. Instead, he offers a series of remarks that consist mainly of hypothetical scenarios and tentative descriptions of various social and linguistic practices, including responses we might have if asked to describe various (often unusual) situations. The remarks are not controversial assertions that Wittgenstein seeks to support and defend, but, as Wittgenstein writes elsewhere, “reminders for a particular purpose.”²⁷ Wittgenstein rejects the notion that philosophy should contain disputable theses or explanations, rather than everyday descriptions with which everyone should presumably agree.²⁸

A few additional remarks about Wittgenstein’s methods may provide useful context for the *Lectures*. In general, if we take him at his word, Wittgenstein’s purpose in his later philosophy is therapeutic.²⁹ His aim is not to offer a solution to any given philosophical problem, but to provide “a clear view

language. See generally *id.* Wittgenstein presents most philosophical problem-solving as effectively trying to deny the extent of this logical imperfection, with interminable philosophical dispute as a consequence. Cf. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 107 (G.E.M. Anscombe trans., 3d ed. 1973) [hereinafter WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS] (“For the crystalline purity of logic was, of course, not a *result of investigation*: it was a requirement.”). For more therapeutic accounts of Wittgenstein’s later philosophy, see, for example, GORDON BAKER, WITTGENSTEIN’S METHOD: NEGLECTED ASPECTS (2006); ROBERT J. FOGELIN, TAKING WITTGENSTEIN AT HIS WORD: A TEXTUAL STUDY (2009); ROBERT J. FOGELIN, WITTGENSTEIN 226–34 (2d ed. 1987) (noting similarities between the later Wittgenstein and Pyrrhonian skepticism); Stanley Cavell, *The Availability of Wittgenstein’s Later Philosophy, in MUST WE MEAN WHAT WE SAY?: A BOOK OF ESSAYS* 44 (2002). The varying interpretations grouped together under the banner “the new Wittgenstein” also promote a generally therapeutic approach. See THE NEW WITTGENSTEIN (Alice Crary & Rupert Read eds., 2000). For a more fine-grained survey, see Hans-Johann Glock, *Perspectives on Wittgenstein: An Intermittently Opinionated Survey, in WITTGENSTEIN AND HIS INTERPRETERS: ESSAYS IN MEMORY OF GORDON BAKER* 37, 52–60 (Guy Kahane et al. eds., 2009) (labeling what I have called “therapeutic” approaches as “irrationalist,” and limiting the label “therapeutic” to explicitly therapy-focused works such as JOHN WISDOM, PHILOSOPHY AND PSYCHO-ANALYSIS (1953) and O.K. Bouwsma, *The Blue Book*, 58 J. PHIL. 141 (1961), <https://sites.ualberta.ca/~francisp/NewPhil448/BouwsmaOnBlueBook61.pdf> (reviewing LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS: PRELIMINARY STUDIES FOR THE ‘PHILOSOPHICAL INVESTIGATIONS’ (1958))).

²⁷ WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 26, §§ 89, 127 (“We want to *understand* something that is already in plain view,” that is, “something that we need to *remind* ourselves of.”).

²⁸ See *id.* § 109 (“We must do away with all *explanation*, and description alone must take its place.”); *id.* § 124 (stating that philosophy can “only describe” the use of language, and “leaves everything as it is”); *id.* § 128 (“If one tried to advance *theses* in philosophy, it would never be possible to debate them, because everyone would agree to them.”). When Wittgenstein refers to “philosophy” in his methodological remarks in the *Philosophical Investigations*, he generally means his therapeutic approach to philosophy, not the problem-solving approaches he critiques. See generally *id.*

²⁹ Cf. *id.* § 133 (“There is not a philosophical method, although there are indeed methods, like different therapies.”).

of the use of our words”³⁰ that will relieve the inquirer of the sense that there is a deep philosophical problem that needs to be (or, indeed, can be) solved.³¹ The same applies to the *Lectures*, although they belong to an earlier, transitional period in Wittgenstein’s thought. Wittgenstein offers reminders of how we speak about religious belief and expressions of that belief. One of his goals seems to be the avoidance of philosophical confusions that might arise from the uncritical adoption of misleading analogies between religious belief and scientific belief.³²

To borrow a term of art from Wittgenstein’s later work, he wants to show us how religious belief is part of a distinct “form of life,” one that differs from the form of life involved in scientific belief.³³ He wants to shift our focus away from the apparent similarities between the linguistic structures of expressions of religious belief and assertions of scientific fact, and toward the dissimilarities between the attitudes and practices that surround religious as opposed to scientific beliefs. When we focus on the bare language of an expression of religious belief, we may assume that the claim can only be understood as an assertion of literal fact; when we expand our view to the way the expression is *used* within a religious form of life, it may become unclear whether the expression is meant as a truth-claim at all, or even whether it makes sense to speak of the speaker as “believing” the claim in any ordinary sense.

For example, as Wittgenstein notes toward the start of the *Lectures*, someone who does not believe in the Last Judgment does not necessarily “believe the opposite” of someone who believes in the Last Judgment.³⁴ We do

³⁰ *Id.* § 122.

³¹ See *id.* § 111 (“[W]hy do we feel a grammatical joke to be *deep*? (And that is what the depth of philosophy is.)”); *id.* § 133 (“It is not our aim to refine or complete the system of rules for the use of our words in unheard-of ways The real discovery is the one that makes me capable of stopping doing philosophy when I want to.”); *id.* § 309 (“What is your aim in philosophy?—To shew the fly the way out of the fly-bottle.”). Wittgenstein would deny that a philosophical problem can be “solved,” if this means discerning the structure of a logical “ideal” or logically “perfect order” where no such perfection exists. See *id.* §§ 98–102, 107–19.

³² Cf. *id.* § 90 (noting that philosophical problems may result from “[m]isunderstandings concerning the use of words, caused, among other things, by certain analogies between the forms of expression in different regions of language”).

³³ For the use of the critically contested term “*Lebensform*” (“form of life” or “life-form”) in *Philosophical Investigations*, see, for example, *id.* § 241 (“It is what human beings *say* that is true and false; and they agree in the *language* they use. That is not agreement in opinions but in form of life.”).

³⁴ Wittgenstein, *Lectures*, *supra* note 25, at 53. I note that although Wittgenstein chooses belief in the future occurrence of the Last Judgment as the most frequently recurring example of religious belief in the *Lectures*, his observations appear to be equally applicable to religious beliefs concerning events in the past, such as belief in the (bodily) Resurrection of Jesus Christ. Understood literally, the claim that the Last Judgment will occur, in all of its florid details (“[p]articles will rejoin in a thousand years”) and the claim that the Resurrection did occur, conflict equally with the norms of scientific belief. *Id.*

not have a clear, well-established way of describing the difference between these two beliefs, but Wittgenstein suggests that there is a difference in kind:

If you ask me whether or not I believe in a Judgement Day, in the sense in which religious people have belief in it, I wouldn't say: "No. I don't believe there will be such a thing." It would seem to me utterly crazy to say this.

And then I give an explanation: "I don't believe in . . .", but then the religious person never believes what I describe.

I can't say. I can't contradict that person.

. . .

You might say: "Well, if you can't contradict him, that means you don't understand him. If you did understand him, then you might." That again is Greek to me. My normal technique of language leaves me. I don't know whether to say they understand one another or not.³⁵

When a believer makes a statement about some religious subject matter, it is tempting to treat the statement like an ordinary assertion of the statement's truth. It is tempting to treat a profession of faith in Judgment Day, for example, as a contestable assertion that the events described in the Book of Revelation will one day take place. Such an assertion would be contradicted by a non-believer's denial that Judgment Day will or could ever come.

Wittgenstein wants to raise the possibility, however, that the believer's relation to the contents of her expression of faith may not be one of ordinary belief at all. The believer's attitude toward the contents of her faith may be so different from ordinary belief that it might be inaccurate to describe a non-believer's denial of the truth of the believer's statements as a "contradiction" of those statements. Treating the believer's expression of faith as a factual assertion may be to "miss[] the entire point" of what the believer said.³⁶ Perhaps Wittgenstein means to suggest that if the believer's profession of faith is seen as a statement of a certain distinctly religious attitude or commitment, and not as an ordinary, contestable, science-like truth-claim, then the non-believer's denial of the truth of the believer's statements may not contradict the believer. The two may instead be "talk[ing] past one another," as Hilary Putnam puts it: "[W]hen the religious person says 'I believe there is a God' and the atheist says 'I don't believe there is a God' they do not affirm and deny the same thing."³⁷

As support for the notion that religious belief might be a special kind of belief, one that does not necessarily entail all that would be entailed by an

³⁵ Wittgenstein, *Lectures*, *supra* note 25, at 55.

³⁶ *Id.*

³⁷ HILARY PUTNAM, RENEWING PHILOSOPHY 143 (2009) (discussing Wittgenstein, *Lectures*, *supra* note 25).

ordinary attitude of belief, Wittgenstein highlights those situations in which our intuitions about how to describe religious beliefs and how to describe ordinary beliefs diverge, as in the following passage:

Suppose somebody made this guidance for this life: believing in the Last Judgement. Whenever he does anything, this is before his mind. In a way, how are we to know whether to say he believes this will happen or not?

Asking him is not enough. He will probably say he has proof. But he has what you might call an unshakeable belief. It will show, not by reasoning or by appeal to ordinary grounds for belief, but rather by regulating . . . all his life.

...
[Student:] Surely, he would say it is extremely well-established.

[Wittgenstein:] First, he may use “well-established” or not use it at all. He will treat this belief as extremely well-established, and in another way as not well-established at all.³⁸

The rules for correctly using terms like the verb “believe” and the adjective “well-established” are relatively clear when we apply these terms to run-of-the-mill empirical claims. But when we attempt to apply these terms (and many others like them) to religious beliefs, the correct way of proceeding is often much less clear.³⁹

Again, the divergence between the way we use the term “belief” in a religious context and in a scientific one suggests that the attitude called “religious belief” (or faith) may be significantly different from the ordinary attitude of belief. This suspicion is strengthened by the differences between the way one speaks of “belief in God” and the way one speaks of ordinary beliefs. For example, believers routinely treat disbelief in God as “something bad,”⁴⁰ while

³⁸ Wittgenstein, *Lectures*, *supra* note 25, at 53–54.

³⁹ In Wittgenstein’s view, this kind of lack in clarity lies at the origin of many philosophical problems. See WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 26, § 123 (“A philosophical problem has the form: ‘I don’t know my way about.’”). Where our agreed-upon rules for the correct use of natural language terms runs out, yet we have a sense that there *must* be a correct way of using the terms in this context—perhaps because we assume there must be a fact-of-the-matter about that which the terms describe, and we further assume that some way of using the terms will “capture” or “correspond to” this state of affairs—we may be tempted to assert a new rule in order to fill the gap and resolve our disquiet. Unfortunately, another philosopher may assert a different, incompatible rule. If both of us view ourselves not as proposing new rules of usage but simply as *stating the way things are*, a logically undecidable (and practically interminable) dispute may result.

⁴⁰ Wittgenstein, *Lectures*, *supra* note 25, at 59. Wittgenstein also hints at the idea that while ordinary belief is often seen as a step down from knowing, almost like an opinion, “believing in

normally this kind of moral judgment would not attach to the question of belief, which is after all generally seen as largely nonvolitional—that is, largely out of our control.⁴¹

In the *Lectures*, Wittgenstein also addresses what I have called “fundamentalism” (although he does not use that term), the insistence by a believer that the contents of his faith are true in the same way and according to the same standards as an accurate work of scientific or historical study:

In a religious discourse we use such expressions as: “I believe that so and so will happen,” and use them differently to the way in which we use them in science.

Although, there is a great temptation to think we do. Because we do talk of evidence, and do talk of evidence by experience.

We could even talk of historic events.

It has been said that Christianity rests on an historic basis.⁴²

Wittgenstein’s representative fundamentalist is a certain “Father O’Hara,” who apparently delivered a series of talks on the BBC in 1930 arguing for the scientific validity of various tenets of Christian faith.⁴³ Wittgenstein criticizes O’Hara for the denial of significant differences between the nature of religious and scientific belief. “What seems to me ludicrous about O’Hara,” Wittgenstein notes, “is his making it [i.e., religious belief] appear to be *reasonable*.”⁴⁴ He adds: “I would definitely call O’Hara unreasonable. I would say, if this is religious belief, then it’s all superstition Not only is it not reasonable, but it doesn’t pretend to be.”⁴⁵

Wittgenstein’s O’Hara denies that the evidence typically offered for the truth of religious belief is of a different kind from scientific evidence. He ignores

God” has an entirely different status, one that seems if anything more solidly rooted than “belief that . . .” something or other is ordinarily, factually the case. *Id.* at 60.

⁴¹ For discussions of some limited senses in which belief may be seen as volitional, see Andrew Chignell, *The Ethics of Belief*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 3 (Oct. 4, 2016), <https://plato.stanford.edu/entries/ethics-belief/> (collecting contemporary philosophical positions).

⁴² Wittgenstein, *Lectures*, *supra* note 25, at 57.

⁴³ See MIKEL BURLEY, CONTEMPLATING RELIGIOUS FORMS OF LIFE: WITTGENSTEIN AND D.Z. PHILLIPS 62 n.17 (2012). Long before the *Lectures*, Wittgenstein was apparently already baffled by attempts to import pre-modern religious practices directly into modernity, without recognizing potential incongruities. Wittgenstein, *Lectures*, *supra* note 25, at 53. When Wittgenstein was serving in the First World War, he “saw consecrated bread being carried in chromium steel. This struck him as ludicrous.” *Id.*

⁴⁴ Wittgenstein, *Lectures*, *supra* note 25, at 58.

⁴⁵ *Id.* at 58–59.

that if you compare the typical evidence for religious beliefs “with anything in Science which we call evidence,” the former appears woefully inadequate.⁴⁶ As Wittgenstein puts it: “[Y]ou can’t credit that anyone could soberly argue: ‘Well, I had this dream . . . therefore . . . Last Judgement.’”⁴⁷ Evidence like this is so inadequate as support for an ordinary, scientific belief that we should question the temptation to say that the speaker has made an error: “You might say: ‘For a blunder, that’s too big.’ If you suddenly wrote numbers down on the blackboard, and then said: ‘Now, I’m going to add,’ and then said: ‘2 and 21 is 13,’ etc. I’d say: ‘This is no blunder.’”⁴⁸ At some point, a departure from a set of norms becomes so severe that we should question whether “error,” “mistake,” or “blunder” are appropriate labels. It might instead be more accurate to describe the behavior not as a violation of the norms we assume to be applicable, but as a faithful adherence to a different set of norms. In the case of religious belief, the kind of evidence offered in support of the belief (“Well, I had this dream . . . therefore . . . Last Judgement”) is so vastly out of alignment with the believer’s attitude of unwavering confidence that we should question whether the confidence is a *mistake* at all, or instead reflects a different attitude from ordinary belief, one that appeals to or relies on a different set of norms. Indeed, if a belief in a religious subject like the coming of Judgment Day could be based on evidence, it would arguably cease to be a religious belief: “if there were evidence, this would in fact destroy the whole business.”⁴⁹

In sum, religious beliefs appear to belong to a different form of life from evaluation according to scientific evidentiary norms. The difference lies not so much in the subject matter of the beliefs as in the different behaviors and attitudes surrounding the beliefs, which we could identify even in an unfamiliar culture, as anthropologists:

We come to an island and we find beliefs there, and certain beliefs we are inclined to call religious. . . .

⁴⁶ *Id.* at 61.

⁴⁷ *Id.*

⁴⁸ *Id.* at 61–62.

⁴⁹ *Id.* at 56; Cf. IMMANUEL KANT, CRITIQUE OF PURE REASON 117 (Paul Guyer & Allen W. Wood eds. & trans., 1998) (“Thus I had to deny knowledge in order to make room for faith.”). O.K. Bouwsma, a Christian philosopher who spent time with and was deeply influenced by Wittgenstein, explores the incompatibility of faith and evidence at length in O.K. Bouwsma, *Faith, Evidence, and Proof*, in WITHOUT PROOF OR EVIDENCE 1, 17–25 (J.L. Craft & Ronald E. Hustwit eds., 1984) (“It is said that oil and water do not mix. And so it is with evidence and faith.”). I note that Bouwsma also detects the underlying connection between atheists and fundamentalists, who share “the disposition to regard all uses of language as the same . . . [and] regard all language as serving ‘to convey thoughts.’” *Id.* at 19.

These statements would not just differ in respect to what they are about. Entirely different connections would make them into religious beliefs⁵⁰

To approach religious beliefs as though they were merely scientific beliefs concerning religious matters—as the fundamentalist does in defending his belief, and as the atheist does in criticizing it⁵¹—may involve a misunderstanding of what religious beliefs are. The denial of differences between religious and scientific beliefs assumes that religious beliefs should rest on scientific proof, when in fact, any belief resting on such proof would, at least arguably, by definition, no longer be a religious belief. It is perhaps because of the profound differences between religious and scientific beliefs that the English language has developed a special term for the former: *faith*.⁵²

B. Legal Discourse: Descriptive and Prescriptive Aspects

Wittgenstein, so far as I am aware, never performed an investigation of legal discourse analogous to his investigation of religious belief in the *Lectures*. If Wittgenstein left behind very little upon which to build a philosophy of religion, he apparently left behind nothing specific upon which to build a philosophy of law.⁵³

⁵⁰ Wittgenstein, *Lectures*, *supra* note 25, at 58.

⁵¹ In his authoritative biography of Wittgenstein, Ray Monk notes:

Both the atheist, who scorns religion because he has found no *evidence* for its tenets, and the believer, who attempts to *prove* the existence of God, have fallen victim to . . . the idol-worship of the scientific style of thinking. Religious beliefs are not analogous to scientific theories, and should not be accepted or rejected using the same evidential criteria.

RAY MONK, LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS 410 (1991).

⁵² Cf. Wittgenstein, *Lectures*, *supra* note 25, at 57 (noting the use of special words such as “faith” and “dogma” to refer to religious beliefs). I note that in German, there is only a single word for “faith” and “belief,” *der Glaube*. Wittgenstein appears to have delivered the *Lectures* in English at Cambridge, and for the most part he is recorded as using the word “belief” rather than “faith.”

⁵³ Most previous efforts to bring the later philosophy of Wittgenstein into dialogue with legal theory have been attempts to draw conclusions about the nature of legal reasoning and interpretation from Wittgenstein’s often misunderstood remarks about rule-following. See, e.g., H. L. A. HART, THE CONCEPT OF LAW 297 n.125 (2d ed. 1994); Ahilan T. Arulanantham, *Breaking the Rules?: Wittgenstein and Legal Realism*, 107 YALE L.J. 1853, 1853 nn.2 & 4 (1998) (collecting sources); Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1, 3 n.13 (1993) (drawing on P.M.S. Hacker’s non-therapeutic reading of Wittgenstein as basis for criticizing emphasis on interpretation among legal theorists). Previous attempts to bring Wittgenstein’s *therapeutic* methods into dialogue with problems in legal and constitutional theory have not, to my knowledge, drawn on the *Lectures* or focused on the descriptive-prescriptive ambiguity of legal discourse. See, e.g., PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) (defining legitimate constitutional argument in terms of six modalities of argument accepted by the legal culture). Bobbitt “mak[es] the basically Wittgensteinian point that

Nevertheless, Wittgenstein's approach to religious belief in the *Lectures* provides a model for a novel approach to understanding legal discourse. We have seen that the surface resemblances between expressions of religious belief and assertions of scientific fact can mislead us into concluding that the former must be viewed as scientific claims about religious subjects. Similarly, this Section will suggest that the superficial resemblances between statements *of* the law made by legal actors and statements *about* the law made by, for example, sociologists, historians, or political scientists can lead us to overlook the distinctive features of legal discourse. Just as viewing a religious person's expression of faith in isolation might lead to the mistaken conclusion that the person must believe her religious views are supported by ordinary empirical evidence, so viewing a judge's or attorney's statement of the law in isolation might lead to the mistaken conclusion that the statement can only be understood as purely descriptive—as a statement of what the law *is* divorced from any consideration of what the law *should be*.

Closer inspection of the practices of judges and attorneys suggests, however, that statements of the law by legal actors can be seen as belonging to a "language game" (to adopt another Wittgensteinian term of art) in which description and prescription are inextricably interwoven. An outsider opposed to the distinctive norms that govern legal discourse is free to dismiss this blending of description and prescription as invalid in some sense—as a confusion or charade, or perhaps as a kind of purely instrumental use of language as performance, detached from any question of belief. The perspective of this critical outside observer (the legal "atheist") will be discussed below. But just as Wittgenstein showed that the religious atheist's view of religious belief is not the *only* one that can be defended in neutral terms—that is, terms that are available to believers and non-believers alike—so the view of legal discourse introduced here attempts to show that the critical outsider's view of legal discourse is not the only one available both to committed legal practitioners and to disinterested observers of the law.

In order to illustrate the distinctive blending of the descriptive and the prescriptive that characterizes legal discourse, it may be useful to begin—in the spirit of Wittgenstein—by considering some hypothetical examples and how we would tend to describe them.

the ground of legal discourse must rest in the practice of legal discourse itself, rather than in some other feature of the world." Jack M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1777 (1994); accord Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEX. L. REV. 1837, 1842–43 (1994) (noting that "[a]lthough Wittgenstein rarely appears explicitly in Bobbitt's work, it has always been clear to philosophically inclined readers that Bobbitt's project is in considerable sympathy with Wittgenstein's"). In any case, "taking a therapeutic Wittgensteinian approach" to a topic or problem is not a predictable, algorithmic process, and this Article does not claim to present the only valid or useful way that Wittgenstein's therapeutic methods might be brought to bear on problems of legal or constitutional theory.

Imagine that a client enters his attorney's office and complains that the city violated his right to free speech under the First Amendment by refusing to post his anti-war ad on the sides of a city bus. After the attorney researches the case law and relevant municipal regulations, it turns out that the specific circumstances of the client's case fall into a gray area. No precedents are entirely on point. Some persuasive authorities suggest that the city violated the client's rights, while others suggest that the city did not.

Let us assume that when the attorney meets again with her client, the attorney does her best to describe the current state of the law in all of its uncertainty and lack of clarity. The attorney tells the client not what either of them wishes the law to be, but simply what the attorney believes the law is. In the course of informing the client about the state of the law, she says things like: "The First Amendment does not allow . . ." and "According to the Supreme Court, the city can probably . . ." The attorney might also frame some of her statements of the law as statements about the likelihood of a judge ruling one thing or another. We might say that the attorney's statements at this meeting are purely "descriptive" statements about the contents of the law, about what the law *is*, not "prescriptive" statements about what the law *should be*.⁵⁴

Now suppose that the client decides to try his luck by filing a lawsuit seeking an injunction against the city. In appearances before the court, and during negotiations with the city's attorneys, the attorney makes claims that, viewed in isolation, appear structurally (that is, if we look only at the form or syntax of the sentences) indistinguishable from the claims the attorney made in private to her client. She continues to say things like: "The First Amendment does not allow . . ." But something has changed. The claims are no longer the same ones that the attorney made to the client behind closed doors. Where the attorney had privately advised that courts disagree about whether the First Amendment allows

⁵⁴ Throughout this Article, I will generally refer to reasoning about what *is* as "descriptive" reasoning, and reasoning about what *should be* or *ought to be* as "prescriptive" reasoning. I use the distinction between "descriptive" and "prescriptive" rather than the more common and somewhat similar distinction between "positive" and "normative" for two reasons. First, I wish to avoid confusions that might arise concerning the relation between my arguments about the nature of legal discourse and related but conceptually distinct debates in legal theory regarding "positivism" (in the sense of the school of legal philosophy), or the "normative" aspect of law (in the sense of obligations that law ostensibly imposes on us). Second, I wish to avoid confusions that might result from uses of the term "normative" (and related terms) to refer to aspects of constitutional interpretation that are not the focus of this Article. For example, many theorists and adjudicators would concede that "norms" have a valid role to play in constitutional interpretation—especially if this means only that there are values of some kind that are somehow implicit in the Constitution—but would insist that these norms exist apart from whatever a legal interpreter might wish to be the case. This Article's concern is different. This Article is concerned with the role of *an interpreter's views* of what the Constitution should mean (her prescriptive preferences) in her stated legal conclusions about what the Constitution does mean. As we will see, the theorists and adjudicators discussed below almost uniformly deny that a legal interpreter's personal prescriptive preferences have any valid role to play in her descriptive conclusions.

a city to behave as it did in the client's case, and cautioned the client that victory was uncertain, the attorney now proclaims that all relevant legal authorities are overwhelmingly on the side of her client and that any cases appearing to reach a different conclusion are distinguishable, poorly reasoned, not binding on the present court, or all of the above.

How should we understand the attorney's statements of the law in her role as advocate, rather than counselor or researcher?

On the one hand, the attorney's statements as advocate present themselves as purely descriptive. The attorney phrases the statements as a description of what the law is, not what the attorney wishes the law were. Perhaps, then, we should say that the statements are what they appear to be: they are descriptions of the law. They may be partially inaccurate, to the extent that they reflect strategic rhetoric or even wishful thinking on the part of the attorney, but they remain inaccurate *descriptions*, not *prescriptions* of what the law ought to be.

On the other hand, it is clear that the attorney's statements of the law during negotiations and in court are not disinterested predictions of what the judge will say if called upon to reach a legal conclusion. Everyone involved recognizes this. The attorney's statements are unabashedly slanted and biased advocacy for what the attorney believes the judge should say in ruling for her client. In that sense, we might be tempted to say that the attorney's statements are simply prescriptive claims: the attorney is implicitly saying what she believes the law *should* be.

Are the attorney's claims as advocate (partially inaccurate) descriptions of what the law is? Or are they (dishonestly phrased) prescriptions for what the law should be? Or something else?

Before answering, we might consider other things that it would not be unusual for the attorney to say. She might transition from a description of what the First Amendment requires to a request that the judge hold that the First Amendment requires what she has said it requires. A statement like "Your Honor, the First Amendment requires . . ." might be followed by a concluding statement like "Your Honor, this court should hold that the First Amendment requires . . ." The latter statement might suggest to us that the former statement, despite its descriptive appearance, was a prescriptive statement all along.

Similarly, we can imagine the attorney, during the course of her argument, transitioning more or less seamlessly from the claim that the legal sources require the court to rule for her client, to the claim that the consequences of ruling for her client will be beneficial for society, or that ruling against her client would be a grave injustice. If the attorney's statements of the law are merely descriptive, as they appear to be based on their phrasing, then what relevance could there be to these arguments concerning policy consequences and principles like fairness or justice? At least at first glance, reasoning based on policy and principle seems relevant to a determination of what the law *should* be, not to a determination of what the law *is*—unless we assume that the law in

question invites a consideration of policy consequences and fairness, which is rarely something that attorneys argue under the circumstances of our hypothetical (that is, where the law itself contains no explicit guidance that courts should consider policy consequences or “equity”).

The attorney’s behavior is so familiar, so routine in our adversarial legal system, that we might be tempted to gloss over its strangeness and assume that we all know exactly what is going on. We might be tempted to say the attorney is simply being an advocate. She is paid to articulate the most advantageous yet plausible understanding of the law for her client, partly in the hope that the judge will echo this understanding of the law when it comes time to make a legal ruling. She might sometimes persuade herself that what she is saying is true, but this is not an essential part of her performance.

Yet the familiarity of legal advocacy in our world may blind us to how unusual it is. Where outside of the law do we find professionals vehemently asserting the reality of their wishes, presenting desired outcomes as already obtained, and requesting action by asserting that the action has already taken place? It is not ordinarily valid to infer from the fact that something should be the case to the conclusion that it is. Where outside of legal forms of life do we find adults (rather than children) arguing that something factually is the case, because it would be *unfair* if it were not the case?

As suggested above, perhaps we can understand the attorney’s arguments concerning policy and principle as *implicitly* saying: what the law is, is determined by what the creators of the law intended it to be, and the creators of the law surely did not intend the negative consequences I am describing. But as already noted, this does not seem quite right, at least in most cases, because the attorney does not usually connect her fairness or consequentialist arguments to evidence concerning anyone’s or any institution’s intentions. Rather, in most cases, the injustice or negative consequences are apparently offered as reasons in and of themselves to reject an opponent’s proposed understanding of the law. The lawyers appear to be openly engaged in advocating for adopting different understandings of the law because of the consequences those understandings would have.

Alternately, perhaps we could understand the attorney’s arguments regarding policy and principle as implicitly saying: the law is not clear on this point—or we might even say that the law does not yet *exist* on this point—and it is up to you as the judge to define the law by making a decision in this case. Here are some reasons why you should adopt my proposed statement of what the law is and reject my opponent’s This would suggest that the attorney’s ostensibly descriptive statements may in fact have been, all along, prescriptive statements *sotto voce* of what the law *should* be.

And yet we would not say that the attorney is *merely* stating what she believes the law should be. There might be any number of differences between what the attorney would wish the law to be, if she could rewrite it from scratch, and how she presents the law in court. To the extent that the attorney’s statements

of the law are prescriptive rather than purely descriptive, they are prescriptions within fairly tight constraints. In general, the attorney will only offer legal prescriptions that she believes the judge, or a judge somewhere along the line, might adopt.

So, which is it? Are the attorney's statements of the law descriptions of what the law *is* or prescriptions for what the law *should* be? Our linguistic intuitions lead us in conflicting directions. This is most likely because the rules governing the correct use of the terms "descriptive" and "prescriptive" do not extend in any clear way to descriptions of the kinds of statements of the law made by actors in the legal system—what might be called *legal* statements, as opposed to scholarly historical or sociological statements. The accepted practice of legal actors in making statements of the law is to blend description and prescription without clearly distinguishing the two. This is how the language game of making legal statements of the law is played.

The phenomenon is not limited to attorney-advocates. Judges' statements of the law blend description and prescription as well, although not in precisely the same ways as attorneys' statements. Perhaps the most significant difference between legal statements of the law by judges and those by attorneys is the performative aspect of the former. If the judge in our hypothetical case rules that the city is prohibited by law from rejecting the client's ad, then we might say that *by virtue of the judge's statement* the city is prohibited by law from rejecting the client's ad. The judge's statement is similar to that of an official who christens a ship by stating, in the appropriate context, "I name this ship the Queen Elizabeth."⁵⁵ We might say that the official's statement becomes true *by virtue of* his having spoken it as he did. In light of the performative aspect of judicial decisions, we might be tempted to conclude that judges' statements of the law (unlike statements by attorneys) are "purely descriptive" in the sense that

⁵⁵ The example comes from J. L. Austin's analysis of performatives in J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 5 (2d ed. 1975). Strangely, to me at least, Austin insists that performatives such as the one in this example are neither true nor false. *See id.* He views performatives as linguistic acts that do not make factual claims, rather than as linguistic acts that make self-referential factual claims that are true when the performative is successfully carried out. I suppose nothing stops us from following Austin's lead. But it is typical of how philosophical disputes arise in contemporary philosophy that Austin presents his way of talking about performatives not as a logically arbitrary choice, undertaken for some practical reason, but simply as the *correct* way of using the terms involved.

Incidentally, Austin himself seems to have recognized that statements of the law by appropriate legal authorities can be seen as performatives. *See id.* at 4 n.2 ("Of all people, jurists should be best aware" that performatives are not statements of fact, "[y]et they will succumb to their own timorous fiction, that a statement of 'the law' is a statement of fact."). I note that Austin is not suggesting here that statements of the law are not purely "factual" in the sense that they routinely contain a blend of the descriptive ("factual") and the prescriptive, as this Article argues. Rather, Austin's point seems to be that statements of the law are not "factual" because they are performative, and performatives (according to his way of talking about performatives, as described above) do not state facts.

the judge's statement is almost by definition an accurate description of what the law is—at least the law of the case, at least for the time being.

But this is not quite right. To the extent that the judge's statement of the law performatively establishes what the law is, we would probably not refer to the statement as a "description" at all. It would be odd to describe the holding in an opinion as an accurate description *of itself*. We would more likely say, simply, "The judge held . . ." or "The judge's decision establishes that . . ."

More importantly, we do not *always* speak of a judge's statements of law as performatively defining what the law is. We tend to recognize that judges can err in their statements of the law. If the judge in our hypothetical case states that the sides of city buses are a traditional public forum under the First Amendment, we would say that the judge's statement is inaccurate. Even when we agree with a judge's legal analysis, it would be odd to say that the First Amendment requires something *because* the judge said the First Amendment required it. We might say this in the context of Supreme Court decisions, if we accept the Supreme Court as the arbiter of the meaning of the First Amendment. But we do not always speak even of Supreme Court decisions as though they are correct by definition. Even the Supreme Court sometimes refers to its past decisions as wrong.⁵⁶

To the extent that we are willing to say a judge's statement of the law may be wrong, the judge's statements can be seen as displaying much of the same descriptive-prescriptive ambiguity as the attorney's statements discussed above. From a Wittgensteinian perspective, the judge operates, like the attorney, in a landscape of logically imperfect legal rules, with no signpost indicating the points at which various forms of constraint give way to various forms of discretion.⁵⁷ Yet judges must make decisions, just as attorneys must zealously

⁵⁶ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 863 (1992) ("[W]e think *Plessy* was wrong the day it was decided . . .").

⁵⁷ Some legal theorists might wish to interject at this point that although the rules embodied in some limited set of written legal materials may be logically imperfect and thus provide inadequate resources for arriving at a single correct answer to a legal question, the law as a whole (correctly understood) supplements these legal materials with other resources, including but not limited to implicit policies and principles, that make it possible for an ideal interpreter to determine the single correct answer to any legal question, no matter how hard the case. This Article does not attempt to develop and defend a Wittgensteinian approach to legal theory in general and to distinguish such an approach from the leading alternatives. Instead, it is assumed that the logical imperfection of the law as a whole often results in hard legal questions with no single deductively correct answer.

I also note that it is unnecessary for this Article to take a position on when and how often, precisely, the law "runs out" in the sense that the relevant legal materials, interpreted in accordance with professional norms, leave room for judges of differing ideological preferences to reach differing legal conclusions through motivated reasoning based on those preferences. All that is necessary for this Article's argument is that the reader agree that such situations are, sometimes, felt to arise, and that they do so frequently enough in constitutional interpretation to merit our attention. The latter claim seems difficult to deny in light of the predictable ideological disagreements in constitutional interpretation even among competent professionals. To attempt to determine precisely, universally, and objectively where the law runs out would require imposing logical

advocate for their clients. Where an analysis of what the law *is* does not decide an issue because the clarity of the accepted legal rules has “run out,” judges are forced to reach decisions about what the law, in some sense, *should* be.⁵⁸

Thus, to the extent that the legal rules governing a case are logically imperfect—to the extent that the determinacy of the law runs out before resolving every material legal issue in a case—judicial statements of the law have a prescriptive aspect no less than the statements of the law offered by attorney-advocates. Both judges and attorneys habitually offer statements of the law that are phrased as descriptions of what the law is but in fact reflect prescriptive views regarding what the speaker believes the law should be. This is how legal discourse works. To intermingle description and prescription in a legal statement of the law, without clearly distinguishing the two, is not a violation of the rules of the judicial or legal-advocacy game. It is to adhere to the pervasive and longstanding if tacit norms of our legal form of life.⁵⁹

perfection on a logically imperfect system—without any practical goals to guide our otherwise arbitrary creation of rules. Rather than inviting interminable philosophical dispute by asserting such rules, the therapeutic Wittgensteinian approach would be to offer clarifying observations about when we might say the law runs out, in the hope of relieving the interlocutor’s (or our own) sense that a correct abstract answer must exist.

⁵⁸ The only alternatives would be for a judge (perversely) to fill the uncertainty in the law with what he believes the law should *not* be, or (arbitrarily) to choose a method of decision that will generate outcomes with a *purely random* relation to what he believes the law should or should not be. But even these approaches would in another sense result in the judge reaching a decision based on what he believes the law should be. The outcome is still determined by the judge’s view of what should determine the outcome; the judge has only displaced his lower-level preferences with a higher-level preference to avoid acting based on the lower-level preferences. Where the factual “is” of law ceases to provide sufficient guidance, and the judge is nevertheless forced to make a decision, it appears the judge has *no choice* but to act based on his own normative “ought,” at some level.

⁵⁹ Paul Kahn offers a perceptive if enigmatic description of what I have referred to as the intermingling of description and prescription in legal discourse:

Together, reason and will operate always to make possible either an affirmation of the status quo or an effort of legal reform. Both are possible moves within the articulation of what the law is. In fact, we constantly make both moves at once: we affirm the current law and seek its reform. What the law is is inseparable from what the law should be.

PAUL KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 15 (1999). Richard Fallon has also argued for a view of legal discourse as a social practice defined in part by the blending of descriptive and prescriptive reasoning. See, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1235 (1987) (“[T]he blurring of the distinction between ‘is’ and ‘ought’ is not methodological confusion but a phenomenon already embedded in our constitutional practice”); Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CAL. L. REV. 975, 980 n.31 (2009) (“[A] tacitly recognized rule of constitutional practice, grounded in acceptance . . . confers upon judges and justices a power to make determinations of what would be legally ‘best’ in a sense that depends partly on moral or policy judgments.”). Although Fallon presents his views as descended from the theories of Ronald Dworkin, he avoids what I see as Dworkin’s Platonism by focusing on the description and evaluation of social practices rather than offering claims about, for example, the ethereal existence

C. *Legal Fundamentalism and Legal Atheism*

The religious fundamentalist, according to the description offered above, denies that there are significant differences between the nature of religious beliefs and the nature of ordinary empirical or scientific beliefs. The fundamentalist ignores the peculiarities of faith: the unshakeable conviction, the way that the belief is bound up with an identity-defining commitment rather than being contingent on ordinary kinds of evidence. Instead, the fundamentalist insists that his religious claims are literally true and are defensible in just the same way as the conclusions from a work of scientific research.

By analogy, we can conceive of a *legal* fundamentalist as someone who denies that there are significant differences between his statements of what the law is and, say, statements about judicial behavior made by political scientists or historians.⁶⁰ The legal fundamentalist insists that when he engages in legal

of correct answers to all legal questions. This Article can be seen as an attempt to address the tension between Fallon's suggestion that the blurring of "is" and "ought" is a "tacitly recognized rule of constitutional practice" and the fact that when judges, legal scholars, and the public speak *explicitly* about constitutional practice, they tend to vehemently deny that such blurring is at all acceptable and to insist that a judge's personal values and preferences should play no role in constitutional adjudication.

I also note that it might be tempting to conclude based on the translated title of JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (William Rehg trans., 1996), that Habermas shares this Article's view of legal discourse as properly constituted in part by the blending of descriptive and prescriptive reasoning. Assuming that Habermas's arguments apply to American legal practice at all, however, he does not endorse this position. Rather, he agrees with Dworkin that all proper legal statements should be purely descriptive, and that the prescriptive appearance of legal discourse is either improper or reflects judges' discernment of moral or political values that are already latent within the law. *See id.* at 224–25 (suggesting that one may suspect judges who adhere to Dworkin's theory of adjudication of improperly making decisions based on political ideology, while Habermas's own theory "remove[s] the suspicion of ideology" by grounding the procedural principles of judging in a dialogical theory of legal argumentation); Wesley Shih, *Reconstruction Blues: A Critique of Habermasian Adjudicatory Theory*, 36 SUFFOLK U. L. REV. 331, 347 (2003) (noting that "Habermas refuses to permit judges to make decisions from material outside of the law, including political ideology," because discretionary judicial decision making "jeopardizes Habermas's concept of strict legal neutrality"). Habermas's title in the original German, "*Faktizität und Geltung*" ("facticity and validity"), refers not to the descriptive-prescriptive aspects of legal discourse described in this Article but to the fact that a legal system, in his view, must at the same time offer factual certainty about what the law is ("established law guarantees the enforcement of legally expected behavior and therewith the certainty of law") and ensure the normative validity of the law ("rational procedures for making and applying law promise to legitimate the expectations that are stabilized in this way; the norms deserve legal obedience"). HABERMAS, *supra* note 59, at 198. A "tension" exists between determinate facticity and normative validity, and modern law displays this tension in its "pure form." *Id.* at 152.

⁶⁰ Consider the psychologist Jonathan Haidt's analogy for the role of motivated reasoning in moral judgment: "The reasoning process is more like a lawyer defending a client than a judge or scientist seeking truth." Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCH. REV. 814, 820 (2001). The assumption is that lawyer-advocates do not purely seek the truth, while judges, like scientists, do. Haidt's analogy

discourse, his statements of the law are not materially influenced by what he might wish the law to be. His legal statements are simply accurate descriptions of the contents of the law. In reality, of course, the legal fundamentalist's conclusions rest on the combination of descriptive and prescriptive reasoning that characterizes legal discourse, but the legal fundamentalist denies that this is the case.

The legal fundamentalist holds the statements of the law made by other legal actors to the same purely descriptive standards that he believes his statements satisfy. When a judge states that the law is one thing, while in fact the law is open to dispute on this point, and the judge's claim reflects in part what she believes the law *should* be, the legal fundamentalist will likely think it fair to criticize the judge's statement as inaccurate and biased—a product of mistake, self-delusion, or dishonesty. The legal fundamentalist assumes that judges should offer nothing but honest, accurate descriptions of the law, entirely uninfluenced by the judge's prescriptive preferences. The legal fundamentalist may acknowledge that it is socially justifiable for attorneys in our adversarial, role-based system to bend their presentations of the law in their clients' favors, but an air of disrepute lingers around even this practice.

This is a deliberately extreme portrait of the legal fundamentalist. In practice, it is hard to imagine an attorney-for-hire adopting a consistent fundamentalist attitude toward all of her statements of the law. Even a judge would have to be powerfully adept at self-delusion to believe that all of her statements of the law were entirely uninfluenced by her view of what the law should be.

But while a pure legal *fundamentalist* may be hard to find, pure legal *fundamentalism* is not. We often find legal actors adopting a straightforwardly fundamentalist attitude toward one or another statement of the law that they have made or are making. "Legal fundamentalism" is a useful explanatory concept because legal fundamentalism is a pervasive phenomenon of our legal culture; its pervasiveness can be found in the frequency with which individual legal actors adopt a legal fundamentalist stance toward individual legal statements.

We can also conceive of legal "atheism" as an attitude toward the blending of description and prescription in legal discourse. An atheist in religious matters is typically someone who agrees with religious fundamentalists that religious claims must stand or fall based on ordinary empirical evidence, but who believes (unlike the fundamentalist) that there is *no* religious tradition whose beliefs succeed according to this standard. Similarly, we can define legal atheism as agreement with the legal fundamentalist that legal conclusions are simply descriptive claims about what the law is, accompanied by the further belief that in virtually every dispute between professionally competent legal fundamentalists, both sides are wrong. The descriptive accuracy that the legal

is also useful as an illustration of the fact that legal fundamentalism remains the default understanding of the law among non-lawyers.

fundamentalist claims is rarely possible, at least in the interesting cases that tend to be the focus of dispute, because the law frequently fails to provide clear guidance about how a case should be decided. The legal atheist believes that more or less all attorneys and judges routinely articulate new rules where they claim merely to speak in accordance with existing rules. They make law based on their views about what the law should be but inaccurately claim merely to have found what the law is. The legal atheist accepts the fundamentalist's demand for descriptive accuracy and honesty, but lacks the faith of the fundamentalist in the God of formal reasoning, the guarantor of the law's completeness and determinacy.

Arguably the purest expression of legal atheism, in the sense above, can be found in Joseph Singer's *The Player and the Cards: Nihilism and Legal Theory*.⁶¹ After providing a classic account of why "neither the theories proposed

⁶¹ See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984). The Critical Legal Studies (CLS) movement in general could be seen as representative of legal atheism in spirit and tone if not always in precise substance. Pierre Schlag, for example, echoes the legal atheist's objection to the pervasive role of unacknowledged prescriptive premises in legal reasoning. Pierre Schlag, *Law as the Continuation of God by Other Means*, 85 CAL. L. REV. 427 (1997). He criticizes "a certain form of reasoning very popular in American jurisprudence. This is the kind of reasoning through which the legal thinker attempts to establish the existence of something fervently desired." *Id.* at 427. Drawing on the rhetoric of religious atheism, Schlag criticizes this form of reasoning as "covertly theological" and "magical thinking." *Id.* at 428, 437. He concludes that

short of dissonance or bad faith (both of which are certainly possible) there is no intellectually respectable way to [continue doing law]. It is no more possible to continue doing law in an intellectually respectable way once the metaphysic is gone, than to continue [to] worship once God is dead.

Id. at 440. One of the central goals of this Article is to raise the possibility that there may be a way to "believe in law" and the Constitution that neither denies the indeterminacy of legal methods highlighted by CLS, nor descends into "dissonance or bad faith." *Id.* at 428, 440.

To take another example from CLS, Duncan Kennedy has recently grappled with many of the same features of contemporary legal scholarship and adjudication addressed in this Article. See Duncan Kennedy, *The Hermeneutics of Suspicion in Contemporary American Legal Thought*, 25 LAW & CRITIQUE 91, 91 (2014) [hereinafter Kennedy, *The Hermeneutics of Suspicion*] (arguing that elite jurists engage in a "hermeneutics of suspicion" by "work[ing] to uncover hidden ideological motives behind the 'wrong' legal arguments of their opponents, while affirming their own right answers allegedly innocent of ideology"). Rather than appealing primarily to religious faith as an explanatory frame, as this Article does, Kennedy's article emphasizes Freud's writings concerning sexual jealousy. See *id.* at 124–25 (discussing jurists' hermeneutics of suspicion as rooted in "projective identification," that is, "projecting something in oneself, something one feels is bad or conflict-producing, onto others, and then vigorously condemning it in them"); *id.* at 136 ("[W]hile the mainstream accepts that value judgments are inescapable, it also views ideologically driven legal error as transgression and sees it everywhere.").

Even more recently, Kennedy has explicitly argued that "it is permissible for the judge to write and speak in bad faith," that is, "consciously and deliberately cast[ing] his argument . . . in the seriously misleading rhetoric of legal necessity," "but only so long as he honestly believes it is (a) necessary to prevent serious bad consequences for the body politic (b) taking into account the negative consequences." Duncan Kennedy, *Proportionality and 'Deference' in Contemporary*

by the [legal] theorists, nor the arguments used by the judges to justify their decisions, nor the legal rules in force are as determinate as traditional theorists and judges claim.”⁶² Singer concludes:

It is understandable that the more controversial and politicized the decision, the more a court will want to appear above controversy. Such false appeals to neutrality are, nonetheless, illegitimate. When judges write opinions justifying their disposition of cases and their choices of rule, they should feel free honestly to express what they really were thinking about when they decided the case. These revelations will clarify the moral and political views at stake in legal controversies. Judges should also explicitly discuss the social context surrounding the legal dispute.⁶³

Constitutional Thought 38–44 (Harv. Pub. Law, Working Paper No. 17-09, 2017), https://papers.ssrn.com/abstract_id=2931220. Although Kennedy correctly notes that his ultimate acceptance in some cases of the permissibility of bad faith formalist judicial rhetoric puts him in tension with other CLS-affiliated scholars such as Karl Klare, from the perspective of this Article his approach remains aligned with CLS in its underlying atheistic assumptions. *See id.* at 39. Kennedy assumes that the self-conscious omission of prescriptive, inevitably ideologically inflected premises from a judge’s legal conclusions must constitute bad faith and “dishonesty,” and thus requires some ethical justification. *Id.* at 40. The Wittgensteinian perspective of this Article, by contrast, suggests that such omission is simply a well-established aspect of the settled social practice of *legal* discourse, and need raise no ethical qualms. In fact, we might wonder whether a legal system based on “honesty” in Kennedy’s sense would even be feasible. If a judge were in every decision in every case ethically obligated to spell out precisely where and how he believed the cited legal materials became uncertain, and then to attempt to specify precisely and completely which considerations beyond those materials influenced his judgment, not only might the process of attempted confession create its own fog of confusion and doubt (where would the phenomenological self-analysis end, especially with regard to obscure, half-perceived inclinations and biases?), but the result would probably be unrecognizable as a judicial opinion. Surely honesty and good faith do not require that legal opinions become something else entirely, such as laborious exercises in publicly displayed introspection.

Finally, I note that Kennedy has described himself as a constitutional atheist, but in a different sense than the one in this Article. *See* Duncan Kennedy, *American Constitutionalism As Civil Religion: Notes of an Atheist*, 19 NOVA L. REV. 909 (1995). He defines constitutional atheism as “the conviction that there is no human collectivity, The People, that authors and consents to constitutional law as laid down by the Supreme Court.” *Id.* at 917. He contrasts his atheism with the views of those who “seem to believe it is meaningful to talk about, and to identify with a trans-temporal mythic People, so that they feel that the text of the Constitution is an emanation of a totality in which they participate in a way that somehow simultaneously binds and ennobles them.” *Id.* at 916. I note that Kennedy also refers to “[c]onstitutional fundamentalism,” which he associates generally with “belief in the People or in Original Intent.” *Id.* at 916.

⁶² Singer, *supra* note 61, at 14.

⁶³ *Id.* at 32. An earlier although less explicit plea for honesty in the statement of legal conclusions can be found in Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 841–42 (1935) (proposing, among other things, that judges “not fool [themselves]” by purporting to base their decisions on neutral logical deductions, but instead

By calling for judicial honesty, Singer suggests that there is something dishonest about the way that judicial opinions and, for that matter, works of legal scholarship are ordinarily presented. But is honesty, in this sense, an appropriate criterion to apply to a legal conclusion? Does it even make sense to speak of a legal conclusion as true or false in the ordinary senses? By treating legal conclusions as ordinary descriptive statements, appropriately evaluated as such, the legal atheist rejects the validity of legal discourse as its own social practice with its own norms, just as the religious atheist denies the basic validity of religious faith as part of a distinct social practice with its own norms of belief and disbelief.

III. CONSTITUTIONAL FUNDAMENTALISM

A. U.S. Constitutionalism as a Civil Religion

As Sanford Levinson recounts in the opening chapter of *Constitutional Faith*, the use of religion as a metaphor for Americans' relationship with the Constitution has a long and varied history.⁶⁴ George Washington, in his Farewell Address, called upon his listeners to ensure that "the Constitution be sacredly maintained."⁶⁵ Jefferson, on the other hand, criticized those who "look at constitutions with sanctimonious reverence and deem them like the ark of the covenant, too sacred to be touched."⁶⁶ In an early speech during an era of frequent mob violence,⁶⁷ and long before he questioned whether "all the laws, but one" should "go unexecuted . . . lest that one be violated,"⁶⁸ Abraham Lincoln exhorted the public to view "'reverence for the laws' as the 'political religion of the nation,'" and declared that "[a]ll laws should be 'religiously observed.'"⁶⁹

"frankly assess the conflicting human values that are opposed in every controversy, appraise the social importance of the precedents to which each claim appeals, [and] open the courtroom to all evidence that will bring light to this delicate practical task of social adjustment . . .").

⁶⁴ LEVINSON FAITH, *supra* note 10, at 9.

⁶⁵ *Id.* at 10.

⁶⁶ *Id.* at 9.

⁶⁷ See DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT 438 (2007) (presenting Lincoln's 1838 Lyceum address as a response to contemporary lawlessness).

⁶⁸ ABRAHAM LINCOLN, *Message to Congress in Special Session* (July 4, 1861), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953).

⁶⁹ LEVINSON FAITH, *supra* note 10, at 10. For early examples of U.S. constitutional law scholars using religion as an explanatory frame, see Robert M. Cover, 'Nomos' and Narrative, 97 HARV. L. REV. 4 (1983); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 2 n.4 (1984) (citing Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984); Sanford Levinson, 'The Constitution' in American Civil Religion, 1979 SUP. CT. REV. 123; Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 551 (1985)). Looming in the background of any contemporary

Levinson's book, originally published in 1988, represented a path-breaking extension of the use of religion as an explanatory frame for U.S. constitutionalism.⁷⁰ As Levinson describes *Constitutional Faith* in a 2011 afterword, the book uses "religious terminology, including, most prominently, the difference between 'protestant' and 'catholic' approaches to the Constitution, as analogies . . . [to] help the reader understand some of the contemporary controversies about how to interpret the Constitution."⁷¹ In the book, Levinson defines protestant and catholic constitutionalism along two axes:

As to source of doctrine, the protestant position is that it is the constitutional text alone (A), while the catholic position is that the source of doctrine is the text of the Constitution plus unwritten tradition (B). As to the ultimate authority to interpret the source of doctrine, the protestant position is based on the legitimacy of individualized (or at least nonhierarchical communal) interpretation (C), while the catholic position is that the Supreme Court is the dispenser of ultimate interpretation (D).⁷²

Levinson also investigates how we identify who is inside and outside the civil religious community defined by U.S. constitutionalism,⁷³ and he asks whether law schools are best understood as analogous to (secular) departments of religion or (non-secular) divinity schools that expect their professors to share in the school's religious faith.⁷⁴

Jack Balkin has extended the comparison between religion and U.S. constitutional culture even further. Balkin's 2011 *Constitutional Redemption*

attempt to make sense of a constitutional political order as a quasi-religious phenomenon is the problematic figure of the Nazi political theorist Carl Schmitt, who famously argued that "[a]ll significant concepts of the modern theory of the state are secularized theological concepts." CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 36 (George Schwab trans., 2005). It might be noted, however, that Schmitt was far from the first Western political theorist to recognize intimate connections between theological ideas and the self-proclaimed authority of the modern European state. See HANS SLUGA, *POLITICS AND THE SEARCH FOR THE COMMON GOOD* 103–04 (2014) (noting the recurrence of analogies between Christian religious and European state authority in Hobbes, Hegel, Nietzsche, and anarchist thought).

⁷⁰ See generally LEVINSON FAITH, *supra* note 10.

⁷¹ *Id.* at 253.

⁷² *Id.* at 29. "It is not necessary that one be 'protestant' or 'catholic' along both dimensions." *Id.*

⁷³ See *id.* at 90–122 (investigating the role of various oaths); *id.* at 122–54 (questioning whether "inner faith" is required for attachment to the Constitution, or whether outward behavior—"good works"—are sufficient).

⁷⁴ See, e.g., *id.* at 179. Paul Kahn considers the same analogy and concludes that law schools, as they currently operate, are more comparable to divinity schools than to departments of religion: "in law, we have only the professional school, without any corresponding academic department." KAHN, *supra* note 59, at 4.

presents the Constitution as a shared focus of political commitment in American life, a common framework through which Americans of differing views can engage one another by articulating their hopes for the future and their understandings of the past.⁷⁵ He draws on the analogy to religion to make sense of a number of aspects of U.S. constitutionalism, including the role of historical narratives in arguments over the Constitution's meaning,⁷⁶ the cultural importance of "fidelity" to the Constitution,⁷⁷ and the unavoidable risk of constitutional idolatry.⁷⁸

In this Part of the Article, I propose a further development of the analogy between religion and America's constitutional culture. Drawing on the discussions of religious and legal fundamentalism above, I suggest that "constitutional fundamentalism" and its alternatives can provide a helpful explanatory frame for making sense of the widely acknowledged and yet perpetually unresolved role of ideological and other biases in constitutional adjudication and legal scholarship on the Constitution.⁷⁹

B. Constitutional Fundamentalism

Constitutional fundamentalism is legal fundamentalism applied to the practice of constitutional interpretation. It is a denial of the distinguishing differences between legal discourse and non-legal descriptive discourse about the Constitution, a denial that the blending of description and prescription has a proper role to play in legal determinations of constitutional meaning. The constitutional fundamentalist assumes that legal statements of what the Constitution means are what they superficially appear to be: purely descriptive. In the fundamentalist's eyes, a judge's or legal scholar's view of what the Constitution *should* mean can play no legitimate role in their statements of what

⁷⁵ See JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011) [hereinafter BALKIN, CONSTITUTIONAL REDEMPTION].

⁷⁶ *Id.* at 1–16.

⁷⁷ *Id.* at 103–39.

⁷⁸ *Id.* at 73–102.

⁷⁹ I note that Levinson also uses the phrase "constitutional fundamentalism" in passing in the 2011 afterword to *Constitutional Faith*, stating that "one finds a kind of constitutional fundamentalism in contemporary American politics that was relatively (even if not completely) absent a quarter century ago." LEVINSON FAITH, *supra* note 10, at 246. He goes on to gesture toward the "[s]acralization" of the Constitution by "[w]orshippers" who view the 1787 text in a way similar to Christian fundamentalists who view the Bible as "the 'unerring' word of God, to be accepted rather than, say, subjected to rational critique and, if need be, 'amendment.'" *Id.* at 253–54. Somewhat similarly, Larry Kramer referred to the conservative majority on the Rehnquist Court as "constitutional fundamentalists, acting to restore the Constitution to what they believe is its true form. Like most forms of fundamentalism, their belief rests on an imagined past that never existed." Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 169 (2001).

the Constitution *does* mean. If one violates the strict separation of description and prescription, one has most likely erred or engaged in self-delusion. It does not occur to the constitutional fundamentalist to describe this violation as no violation at all, but as an adherence to the norms that have developed to govern legal interpretations of the Constitution.

The fundamentalist's description of the Constitution's meaning is no less influenced by her prescriptive preferences than the descriptions offered by her opponents, but the fundamentalist is convinced that this is not the case. She is convinced that her own legal view of the Constitution is simply an accurate description, uninfluenced by her preferences, while the views of her legal opponents are pervasively distorted by their personal biases. Compare the Protestant fundamentalist who denies the distinction between religious and scientific belief and on that basis insists that the events in the Bible must be straightforward historical fact, while at the same time insisting that the events described in the Koran never happened. The constitutional fundamentalist, similarly, denies the distinction between legal and scholarly discourse and, on that basis, insists that her understanding of the legal meaning of the Constitution is simply what results when one undertakes a rigorously neutral, thorough investigation, while her opponents' understanding is inappropriately tainted by personal preferences about what should be the case. The constitutional fundamentalist sees no intelligible third way between pure description and pure prescription, assumes that legal interpretation must be a purely descriptive practice, and chastises her opponents for allowing their prescriptive biases to distort their descriptive conclusions.

The constitutional fundamentalist need not subscribe to any particular methodology of constitutional interpretation. He may believe that the meaning of the Constitution is determined by the structure of its text, or some form of original understanding, or Supreme Court precedent, or a combination of these elements and the principles of American democracy, or something else entirely. Any number of sources may play a role in the constitutional fundamentalist's explanation of what the Constitution means. The one thing that the constitutional fundamentalist will not concede, however, is that one of the sources for his interpretation is what he would *like* the Constitution to mean and his view of what the Constitution *should* contain. It may be, the fundamentalist insists, that as a matter of policy or moral principle, he would prefer the outcomes dictated by the view of the Constitution he is presenting, but this personal preference is neither here nor there. Any resemblance between his description and his preferences is purely coincidental. The fact is, the fundamentalist concludes, the view of the Constitution he is presenting just happens to be *the most correct one*.

A constitutional fundamentalist judge will insist that he approaches the meaning of the Constitution only with an eye to arriving at an accurate understanding. His job is to enforce the Constitution, not rewrite it. What he wishes were included in the Constitution is irrelevant—no more relevant than an umpire's wishes regarding who should win a baseball game. The constitutional

fundamentalist judge views himself as nothing more than a neutral umpire, applying the law of the Constitution to the facts of the cases that come before him.

Of course, in reality, the constitutional fundamentalist judge—like any judge faced with an open constitutional question—must choose between various ways of interpreting the Constitution in light of the relevant precedents,⁸⁰ and within the ambit of his chosen methods, must choose between various specific interpretations that can be produced using those methods. In practice, the judge will almost inevitably make these choices based on his view of what the *best* interpretation of the Constitution would be. It will be impossible in practice to disentangle this notion of “*best*” from his own preferences.

Nevertheless, the constitutional fundamentalist judge may make a great show of being *forced* to reach the conclusion he reaches, as though against his will. He may even highlight those occasional instances when the conclusion he reaches regarding what the Constitution requires conflicts with his policy preferences, the outcome he would choose if he were simply a legislator. He may present these moments of apparent conflict as evidence that his statements of the meaning of the Constitution are determined by his best efforts to discern what is the case, not by reliance on what he wishes were the case. Upon closer inspection, of course, we may wonder whether these exceptional decisions were in fact in conflict with the judge’s view of what the law should be, or were instead in accord with the judge’s higher-level methodological preferences, which were in turn shaped by the judge’s view of what the law should be. Like Br’er Rabbit,⁸¹ the constitutional fundamentalist judge may make a great show of not wishing to be forced to go to the place where he, in another sense, wishes to go. We might even say that the fundamentalist’s Constitution is often a kind of Briar Patch Constitution: it routinely ends up *forcing* judges to head in the directions they would have gone anyway.⁸²

⁸⁰ A Supreme Court Justice will of course be much less constrained by precedent than a lower-court judge who is potentially subject to appellate review.

⁸¹ *The History of Brer Rabbit*, BRER RABBIT (Apr. 26, 2013), <http://www.brerrabbit.com/the-history-of-brer-rabbit/>.

⁸² Judge Posner offers a thorough account of the behavior described here:

Justices occasionally, and sometimes credibly, issue express disclaimers that a particular outcome for which they voted is one they would vote for as a legislator But such discrepancies between personal and judicial positions usually concern rather trivial issues, where the judicial position may be supporting a more important, though not necessarily less personal, agenda of the Justice.

So it is misleading when a Justice replies to a criticism of a controversial decision that he or she joined by saying that it was a vote against the Justice’s “desire.” People have multiple desires, often clashing, and then they must weigh them against each other

. . . Sometimes, moreover, what is involved in voting against one’s seeming druthers may be a calculation that the appearance of being “principled” is

It might be objected at this point: why call the phenomenon summarized above “fundamentalism”? When we think of religious fundamentalism, especially in the context of American Protestantism, we most often think of a group insisting on taking guidance solely from a sacred text or group of texts that the group believes to be literally true and divinely inspired.⁸³ These texts can be seen as the “foundations” to which religious fundamentalism insists we must return, against the siren song of uprooted, secular modernity. By contrast, constitutional fundamentalism as described above is not limited to those interpreters who insist on returning to one or another original understanding of the constitutional text. It encompasses the constitutional interpretations of anyone who makes legal assertions about the Constitution—that is, assertions that blend the descriptive and the prescriptive in the characteristic manner of legal discourse—while insisting to the contrary that he is offering a purely descriptive assertion, one that rests solely on reasoning about what is the case.

To begin with, it is useful to have some shorthand label for this rather complicated but extremely common phenomenon. The term “fundamentalism” is particularly appropriate because of the similarity between the underlying attitudes of the religious and the constitutional fundamentalist, as I have described them above. Both are participants in a social practice that calls upon them to express belief in what appear to be factual claims. But in both cases, participants in the practice treat these claims differently in important respects from the ways that factual claims are ordinarily treated. In both cases, the fundamentalist denies that these differences exist with regard to her own claims and also denies that these differences should exist with regard to anyone else’s claims. The fundamentalist insists that the claims *she* believes are simply factually true and that others’ conflicting claims are simply factually false.

Examples of fundamentalism in U.S. constitutional adjudication and scholarship are legion. One sees the pervasiveness of the attitude perhaps most clearly when judges and legal scholars engage in theorizing about the proper methods of constitutional interpretation. It is there that the interpreter’s

rhetorically and politically effective. It fools people. So it is worth adhering to principle when the cost to competing desires is slight.

Posner, *supra* note 4, at 50–52.

⁸³ See *supra* notes 17–22 and accompanying text. In fact, the conflict between Biblical literalism and its opponents long predated the fundamentalist backlash against Enlightenment modernity. See, e.g., RUTHVEN, *supra* note 16, at 9 (noting that early church fathers such as St. Augustine opposed widespread literalist understandings of the eschatological return of Jesus to rule over an earthly kingdom by allegorizing and spiritualizing the notion of “the Kingdom of God”). It is also possible to imagine forms of fundamentalism that rest on dogmas not stated in any particular sacred text. Indeed, the inerrancy of the Biblical text was only one of the five dogmas set forth in the early fundamentalist manifesto issued by the conservative Presbyterians of Princeton in 1910. See ARMSTRONG, *supra* note 16, at 170–71. Their four other dogmas were: the Virgin Birth of Christ, Christ’s atonement for our sins on the cross, his bodily resurrection, and the objective reality of his miracles. *Id.* Exclusive adherence to the literal truth of a sacred text is arguably neither a necessary nor a sufficient condition for fundamentalism.

perceptions of the reasoning shaping her constitutional conclusions are most often made explicit.

Most works of constitutional theory offer arguments concerning the desirability of the approach they advocate to constitutional interpretation. In doing so, they often tacitly or explicitly acknowledge that the choice between general methods of constitutional interpretation *is* a choice, rather than a question whose correct answer can be determined simply through factual analysis, without the consideration of values and goals.⁸⁴ Because few works of constitutional theory present themselves as the discovery of the correct general method for interpreting the Constitution, as though this were an objective fact embedded in the Constitution itself, few works of constitutional theory are fundamentalist in the sense of presenting themselves as merely descriptive when in fact they are based in part on prescriptive considerations about how the Constitution *should* be interpreted in light of various practical and political goals.⁸⁵

It is true that judges and legal scholars engaged in constitutional theorizing will often use rhetoric suggesting that their general method of interpreting the Constitution is the only proper or correct method, while the methods of their opponents are improper or wrong. But when viewed charitably and in context, such claims are nearly always accompanied by a recognition that the sense in which one's own method is "proper" and all other methods are "wrong" involves some consideration of contestable values. Claims for the *correctness* of a general method of constitutional interpretation usually turn out to be claims that the method best fulfills a number of widely shared goals such as ensuring legal consistency, maintaining democratic accountability, protecting rights where they should be protected, and maximizing institutional competence—not the claim that the theorist has discovered a self-interpreting interpretive manual buried in the Constitution itself and that anyone who refuses to obey the rules of this manual necessarily displays infidelity to the Constitution.

⁸⁴ Most works of constitutional theory, in other words, agree with Richard Fallon that "[t]he written Constitution, by itself, cannot determine the correctness of any particular theory of constitutional interpretation. Selection must reflect a judgment about which theory would yield the best outcomes, as measured against relevant criteria." Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 538 (1999).

⁸⁵ But see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 37–69 (2009) (discussing "hard originalism," variants of originalism that purport to be in some sense inescapably true); accord Cass R. Sunstein, *There is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193, 193 n.1 (2015) (presenting Larry Alexander and Walter Benn Michaels as writers who defend the thesis that "the very idea of interpretation requires judges to adopt their own [*i.e.*, Alexander's or Michaels's] method of construing" the Constitution). Richard Fallon similarly states that "proponents of text-based theories sometimes suggest that their theories are justified by their uniquely excellent fit with the written Constitution and that normative argument is therefore unnecessary." Fallon, *supra* note 84, at 540 n.9 (citing ROBERT H. BORK, *THE TEMPTING OF AMERICA* 1–5, 143–44 (1990)).

Consider Justice Scalia. In a celebrated piece from 1997, he begins his defense of his preferred form of originalism by criticizing the Supreme Court's current practices:

Worse still, . . . it is known and understood that if [the logic of the Supreme Court's constitutional precedents] fails to produce what in the view of the current Supreme Court is the *desirable* result for the case at hand, then, like good common-law judges, the Court will distinguish the precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean If it is good, it is so.⁸⁶

In other words, like so many constitutional theorists, Justice Scalia criticizes his opponents for smuggling prescriptive reasoning into their descriptive conclusions—or what I have called in this Article *engaging in legal discourse*. When Justice Scalia goes on to criticize this blending of descriptive and prescriptive reasoning in the Supreme Court's constitutional adjudication by stating this is “not the way of construing a democratically adopted text,”⁸⁷ we might think at first that he assumes the history of the Constitution's adoption implies that his form of originalism is the only correct way of construing the Constitution, in a purely factual sense, and regardless of anyone's values—just as, one might argue, there is only one “correct” direction for winding a watch. To wind most watches implies, by definition, rotating the crown clockwise; to interpret the Constitution, it might be argued, implies determining the original public meaning of the text. If you spin the crown counterclockwise, you are not winding the watch; if you use the constitutional text as a vehicle for applying current social values, you are not interpreting the Constitution.

In an earlier piece, however, Justice Scalia suggests that he does not assume all constitutional interpreters are rationally required to adhere to his form of originalism, regardless of their values or goals. He does not assume that the nature of constitutional interpretation (for the U.S. Constitution) mandates the use of his originalism in the same way that the nature of watch-winding mandates a clockwise turn. In “Originalism: The Lesser Evil,” from 1989, Justice Scalia accepts that the choice between originalism and its alternatives is a choice about which reasonable people might disagree in light of differing goals and values.⁸⁸ He argues in favor of his version of originalism on the grounds of democratic

⁸⁶ Scalia, *supra* note 5, at 39.

⁸⁷ *Id.* at 40.

⁸⁸ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862, 864 (1989) (arguing in favor of a “faint-hearted” form of originalism as “the lesser evil” after considering some of “the principal difficulties with the originalist and nonoriginalist approaches”).

principle and various practical considerations, including the desirability of the results it is likely to produce.⁸⁹ There is nothing fundamentalist in this position.⁹⁰

It is not at the level of *choosing* a constitutional theory that judges and legal scholars most often adopt a fundamentalist attitude, but at the level of *applying* the theory. Both when judges and legal scholars describe in general how the application of their constitutional theories work, and when they engage in that application, fundamentalism appears to exert a powerful attraction. Again, Justice Scalia provides a good illustration. After tacitly acknowledging that the choice of constitutional theory may properly be shaped by prescriptive considerations, Justice Scalia shows no willingness to acknowledge the same with regard to the application of his theory. He recognizes that “it is often exceedingly difficult to plumb the original understanding of an ancient text,”⁹¹ but insists that a judge’s prescriptive preferences have no proper role in originalist adjudication: “Originalism . . . establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”⁹²

I do not suggest, mind you, that originalists always agree upon their answer. There is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court. But the originalist at least knows what he is looking for: the original meaning of the text. Often—indeed, I dare say usually—that is easy to discern and simple to apply.⁹³

As critics of various forms of originalism have frequently observed, statements like this are a wildly inaccurate estimation of the degree to which forms of originalism like Justice Scalia’s can or do provide determinacy and

⁸⁹ See, e.g., *id.* at 855–56 (criticizing the liberty-enhancing benefit of nonoriginalism as “illusory,” because nonoriginalism can be used to contract as well as expand liberty); *id.* at 856–57 (acknowledging the practical difficulty of applying originalism correctly); *id.* at 861 (presenting as a weakness of originalism that it would sustain public flogging and “handbranding” against an Eighth Amendment challenge).

⁹⁰ But see ANTONIN SCALIA, *Response, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 90, 135 (Amy Gutmann ed., 1997) (“[D]ocuments rarely specify how they are to be construed—which does not mean that there is no right and no wrong construction.”). Jamal Greene presents Justice Scalia as more of a fundamentalist at the level of theory-choice than I have. See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 658 (2009) (arguing that “Justice Scalia has described an originalist approach to interpretation as a prerequisite to faithful application of a written Constitution”). At the very least, Justice Scalia does not state explicitly that he believes the Constitution itself, apart from any political or practical considerations, dictates that it can only be interpreted correctly through the originalist methods that he describes.

⁹¹ Scalia, *supra* note 88, at 856.

⁹² *Id.* at 864.

⁹³ Scalia, *supra* note 5, at 45.

constraint against the imposition of a judge's values.⁹⁴ Indeed, Scalia leaves unspecified how judges are to decide when confronted with competing, plausible interpretations of "the original meaning of the text."⁹⁵ In practice, the evidence suggests that judges using originalist methods, including Justice Scalia, choose the *best* interpretation—where "best" ordinarily ends up meaning, in practice, the interpretation that comes closest to realizing the judge's values.⁹⁶ Yet even as Justice Scalia blends descriptive and prescriptive reasoning in his originalist legal practice, he insists that he is doing nothing of the kind. As we have seen,⁹⁷ he insists that he is simply providing an accurate historical description, like the

⁹⁴ See also Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545, 560, 562 (2006) (arguing that "[o]riginalism uses political and litigation strategies to infuse the law of the Constitution with contemporary political meanings that originalists find compelling," and that "[i]f Justices Thomas and Scalia are exemplars of the kinds of originalist judges that the political practice of originalism seeks to appoint, then originalism has been as much a political practice on the bench as off it"). Post and Siegel collect a number of illustrations of Justices Thomas and Scalia selectively applying originalist methods to reach conservative ends. See *id.* at 562–68. They also quote Mark Graber's observation that "[t]he originalist foundations of *Bush v. Gore* remain a judicial mystery." Mark A. Graber, *Clarence Thomas and the Perils of Amateur History*, in *REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC* 70, 88 (Earl M. Maltz ed., 2003); compare *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Scalia, J., majority opinion), with *id.* at 636 (Stevens, J., dissenting). On *Heller*, see, for example, Mark Tushnet, *Heller and the New Originalism*, 69 *OHIO ST. L.J.* 609, 609–10 (2008) (arguing that the "new originalism," as illustrated by the "history-in-law" discourse of *Heller*, "cannot deliver on its promises," because its "search for . . . the single . . . conventional understanding of constitutional terms is doomed, at least in the most interesting cases"); Richard A. Posner, *In Defense of Looseness*, *NEW REPUBLIC* (Aug. 27, 2008), <https://newrepublic.com/article/62124/defense-looseness> (describing the majority opinion in *Heller* as "law office history" and a "snow job[]").

⁹⁵ Scalia, *supra* note 5, at 45. Much less does he specify how judges are to proceed with the even less constrained process of constitutional "construction," if a distinction between interpretation and construction is accepted. See generally JACK M. BALKIN, *LIVING ORIGINALISM* 4–6 n.2 (2011) [hereinafter BALKIN, *LIVING ORIGINALISM*] (discussing the different senses of "constitutional interpretation," distinguishing "ascertainment of meaning" from "constitutional construction," and citing RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 118–27 (2004); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 5 (1999); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); and Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291, 293–94, 300–07 (2007) as sources for the interpretation-construction distinction). Throughout this Article, for convenience, I have ignored the arguments for a distinction between the ascertainment of constitutional meaning and constitutional construction, collapsing both practices under the label of "constitutional interpretation."

⁹⁶ See *supra* note 94.

⁹⁷ See, e.g., Scalia, *supra* note 88, at 864 ("Originalism . . . establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.").

kinds of descriptions offered by historical scholars.⁹⁸ He becomes a fundamentalist.

Justice Scalia is far from alone in adopting a fundamentalist attitude when he turns from high-level constitutional theory choice to more concrete considerations regarding the application of a theory's interpretive methods. The constitutional fundamentalist label applies whenever a judge or legal scholar presents her chosen constitutional theory as constraining her interpretation in an ideologically neutral way, and then applies the theory in a way that is not ideologically neutral, but instead aligns with her own ideological preferences.⁹⁹ Such behavior, needless to say, is not rare.¹⁰⁰ In the interest of space, I will offer

⁹⁸ *Id.*

⁹⁹ More generally, and taking into account the fact that a judge's or legal scholar's preferences might not have an easily categorized ideological valence, the constitutional fundamentalist label applies whenever a judge or legal scholar presents her constitutional interpretation as the result of purely descriptive reasoning, uninfluenced by her own preferences regarding what the law should be, when in fact the interpretation was shaped by these prescriptive preferences. This Article's primary concern, however, is with the role of specifically ideological prescriptive preferences in constitutional interpretation.

I also note that this Article has self-consciously alternated between describing constitutional fundamentalism in terms of the way an interpreter *presents* her interpretations (publicly) to others, as in the preceding paragraph, and in terms of an interpreter's (private) *attitude* toward her interpretations, on the assumption that the public presentation and the private attitude will often coincide, especially in the cases of judges and legal scholars. To the extent that there is a divergence between the public presentation and the private attitude, a distinction could simply be drawn between public or objective and private or subjective fundamentalism.

¹⁰⁰ In a monumental string-citation, Barry Friedman quotes the following constitutional theorists presenting their theories as a source of ideologically neutral constraint on judicial review: Charles Black, Robert Bork, Ronald Dworkin, John Hart Ely, Akhil Reed Amar, Antonin Scalia, and David Strauss. See Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 267 n.53 (2005); see also *id.* at 268 nn.57–58 (more sources expressing support for the imposition of ideologically neutral constraints on judges). It would not be surprising if a review of these theorists' applications of their ostensibly ideologically neutral and constraining methods turned out to show a correlation between the theorist's constitutional interpretations and her (actually, all "his") ideological leanings, as we saw in the case of Justice Scalia and will see in the case of Ackerman. See generally, e.g., RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996) (discovering in the Constitution a number of moral principles that happen to be sympathetic to the ideological views of Ronald Dworkin).

Amar's recent work interpreting the contents of various unwritten sources of constitutional law received particularly harsh criticism along these lines. See, e.g., Richard A. Posner, *How Many Constitutions Can Liberals Have?*, NEW REPUBLIC (Oct. 19, 2012), <https://newrepublic.com/article/108755/how-many-constitutions-liberals> (reviewing AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012) and presenting Amar as "updating" the Constitution as the Catholic Church updates the Bible; noting incredulously that Amar claims his constitutional views, no matter how "wild" they may seem, "are in this . . . constitution; that he did not put them there"; and criticizing the book as "not a work of legal analysis," but rather "the effusion of a visionary and a utopian—of an idolater of the Constitution"). Although Amar can accurately note that not all of his specific constitutional interpretations represent policies he would personally support—for example, he finds an individual

only one further example of constitutional fundamentalism, drawn from the works of a leading progressive constitutional theorist—partly in order to make clear that constitutional fundamentalism has no necessary ideological valence.

Over the last three decades, Bruce Ackerman has developed a dualist constitutional theory based on the notion that the American people sometimes participate in a kind of elevated deliberative politics that transcends factional self-interests.¹⁰¹ Through these moments of “higher lawmaking,” the people have the power to amend the Constitution outside of the formal amendment procedures in Article V.¹⁰² This allows Ackerman to say that the American people amended the Constitution during the New Deal to allow the modern administrative state, even though there were no formal amendments along these lines—thus solving one of the great doctrinal puzzles of American constitutional

right to keep a gun in one’s home—it is difficult to see how he could refute the subtler point that the book’s chapters reflect general constitutional visions that align with contemporary progressive values, while equally plausible but anti-progressive constitutional visions have been excluded. See David A. Strauss, *Not Unwritten After All?*, 126 HARV. L. REV. 1532, 1550, 1561, 1563 (2013) (praising Amar’s “highly creative” arguments, but concluding that Amar’s interpretations are the result of “approach[ing] the written Constitution with certain ideals in mind,” and suggesting that someone with different ideals could most likely find no less persuasive support, using Amar’s tools, for less amenable constitutional visions, such as “the Economic Freedom Constitution, or the Anti-Tax Constitution, or the States’ Rights Constitution, or the Nativist Constitution”).

¹⁰¹ See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 32–33 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*] (defining higher lawmaking as a six-stage process, and analyzing the civil rights revolution as an extra-Article V amendment signaled by the Supreme Court in *Brown*, realized through landmark statutes, and consolidated by the “switch in time” of *Milliken v. Bradley*); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 20–26 (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*] (describing extra-Article V constitutional amendment as a five-stage process carried out during Republican Reconstruction, when it was led by Congress; and again during and after the Great Depression, when it was led by the President); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1039, 1046 (1984) [hereinafter Ackerman, *The Storrs Lectures*] (introducing the theory of dualist democracy and arguing that “our Constitution is one great effort to distinguish between those rare acts of representative government backed by the considered judgments of the mass of mobilized citizens and the countless actions based on something less than this”); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 803–04 (1995) (arguing that the Americans who fought the Second World War extratextually amended the Constitution to render the Treaty Clause optional); ACKERMAN, *FOUNDATIONS*, *supra* note 101, at 32–33, 58, 165–99, 266–67 (describing the theory of dualist democracy, outlining American constitutional history as a series of three regimes, describing the constitutional politics of the Founding, and defining constitutional moments as a four-stage process). Ackerman appears to have originally envisioned that the third volume in the “We the People” series would analyze the extent to which Supreme Court constitutional doctrine has served the function of preserving the American people’s dualist decisions. See ACKERMAN, *FOUNDATIONS*, *supra* note 101, at 118 n.*; ACKERMAN, *TRANSFORMATIONS*, *supra* note 101, at 349, 403. This now appears to be the topic of a projected Volume 4. See 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 348 n.27 (2014) [hereinafter ACKERMAN, *CIVIL RIGHTS REVOLUTION*].

¹⁰² See ACKERMAN, *TRANSFORMATIONS*, *supra* note 101, 20–28.

law.¹⁰³ More generally, Ackerman offers a clever defense of judicial review by presenting it not as countermajoritarian, but as a way of preserving the higher lawmaking of the American people after a “constitutional moment” has ended and “normal politics” has returned.¹⁰⁴ He also provides a sweeping and influential view of American political history as a series of constitutional regimes.¹⁰⁵

Ackerman’s works depart from the norms of orthodox historical or political science scholarship in a number of ways—for example, by introducing fanciful dialogues with fictional characters,¹⁰⁶ proposing constitutional amendments favored by the author,¹⁰⁷ offering a (self-described) “jeremiad against the Europeanization of American constitutional thought,”¹⁰⁸ exhorting the reader to engage in constitutional politics in order to build a “more just and free” constitutional order,¹⁰⁹ and inviting the reader to defy the “elitist effort” of the constitutional originalists on the Roberts Court “to erase the constitutional legacy left behind by our parents and grandparents as they fought and won the great popular struggles of the twentieth century.”¹¹⁰ Like Justice Scalia, Ackerman quite openly acknowledges that his general methods of constitutional interpretation are one choice among others.¹¹¹ He is not a fundamentalist at the level of constitutional theory-choice.

From the start, Ackerman has also been clear that he is attempting to produce accurate, ideologically neutral historical writing, and that his constitutional theory is intended to provide a serious method of constitutional interpretation that could be adopted by practicing lawyers and judges,

¹⁰³ ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 101, at 63–78.

¹⁰⁴ See ACKERMAN, FOUNDATIONS, *supra* note 101, at 9–10.

¹⁰⁵ ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 101, at 46–49, 63–78, 258; Ackerman, *The Storrs Lectures*, *supra* note 101, at 1039–40.

¹⁰⁶ See, e.g., ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 101, at 23–26.

¹⁰⁷ *Id.* at 33.

¹⁰⁸ *Id.*

¹⁰⁹ See, e.g., *id.* at 5, 32, 57; ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 101, at 34 (“I am . . . urging you to . . . grant full constitutional status to the landmark statutes of the civil rights revolution.”); *id.* at 35 (“[W]e must redefine the [constitutional] canon.”).

¹¹⁰ ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 101, at 19; see also *id.* at 27 (“Recent Democratic victories have halted this dynamic for the moment. The only question is whether the conservative majority on the Court will use its remaining years to stage a full-scale assault on the twentieth century.”).

¹¹¹ See *id.* at 36 (presenting his approach to constitutional interpretation as a “proposal” that might or might not be adopted); *id.* at 1070–71 (offering reasons “why all [the] effort” involved in his theory’s historical reinterpretations “might prove worthwhile”).

presumably including the Justices of the Supreme Court.¹¹² As he writes in the most recent volume of *We the People*:

For me, the “living Constitution” is not a convenient slogan for transforming our very imperfect Constitution into something better. While the effort to make the Constitution into something truly wonderful is an ever-present temptation, the problem with this high-sounding aspiration is obvious: there are lots of competing visions of a better America, and the Constitution shouldn’t be hijacked by any one of them. The aim of interpretation is to understand the historical commitments that have *actually* been made by the American people, not those that one or another philosopher thinks they should have made.¹¹³

Ackerman notes that if his constitutional theory—his “proposal”—is adopted (“and stranger things have happened”), “legal debate would take on a different shape.”¹¹⁴ His “ultimate aim, in short, is to deny that law is politics by other means and that constitutional interpretation is mere pretense.”¹¹⁵ “[M]y task,” he writes, “is to interpret the American Constitution as it is, not as it ought to be.”¹¹⁶

Despite Ackerman’s frequent declarations of the intended neutrality of his interpretations, however, the results have always seemed peculiarly in line with Ackerman’s progressive ideological sympathies.¹¹⁷ In other words, Ackerman, like Justice Scalia, falls into an attitude of fundamentalism at the level of theory-application. He insists that he is simply offering a neutral description of the meaning of the Constitution, grounded in accurate historical scholarship—

¹¹² See, e.g., Ackerman, *The Storrs Lectures*, *supra* note 101, at 1048 (arguing that constitutional lawyers “can no longer allow” themselves to be “blind . . . to the distinctive dualistic logic of their own democratic system,” with the rhetorical suggestion that dualist democracy is simply an accurate description of what American constitutionalism is); *id.* at 1057 (suggesting that his theory allows lawyers to understand “the existing system of legal principles in a new, and historically deeper, way”); *id.* at 1070 (“[I]f the interpretivist is *serious* about interpretation, he cannot refuse to read a text simply because he finds its message inconvenient.”). In *The Storrs Lectures*, perhaps more than in later works, Ackerman acknowledges a tension between the work of “professional historians” and the kind of grand historical narrative project he seeks to develop. See *id.* at 1052.

¹¹³ ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 101, at 34–35.

¹¹⁴ *Id.* at 36.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 71. In a blog post responding to commentary on Volume 3, Ackerman reaffirmed his belief that “the ongoing effort to define Wechslerian ‘neutral principles’ is the hallmark of a successful constitutional culture.” Bruce Ackerman, *A Third Founding: Part Two—Fidelity or Betrayal?*, BALKINIZATION (May 22, 2014), <https://balkin.blogspot.com/2014/05/a-third-founding-fidelity-or-betrayal.html>.

¹¹⁷ For an early expression of these sympathies, see BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1981).

when, in fact, it has been obvious to most observers that he is blending prescription and description in the manner of a legal advocate.¹¹⁸ After describing in an early review of “We the People: Volume I” how Ackerman makes strategic use of the Bork nomination as evidence that Reagan Republicanism represented a failed constitutional moment, Suzanna Sherry dryly notes: “All this may not tell us very much about constitutional politics, but it tells us quite a bit about Bruce Ackerman’s politics.”¹¹⁹

¹¹⁸ See, e.g., William W. Fisher III, *The Defects of Dualism*, 59 U. CHI. L. REV. 955, 964 (1992) (“Constitutional scholars often get in trouble claiming that the Framers saw things just the way they themselves do, and Ackerman is no exception.”); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 770, 778–79, 785, 789–93 (1992) (criticizing Ackerman’s selective historical methods, including his failure to acknowledge the racially discriminatory administration of the New Deal; describing Ackerman’s “intergenerational synthesis” defense of *Brown* as a descent “from implausibility to fantasy”; and noting that Ackerman abandons “his own constraining criteria” for the definition of constitutional moments, leading one to wonder: “If the 1960s civil rights movement, why not the 1920s Ku Klux Klan crusade?”). In a critique of Ackerman’s theory, the historian Jack Rakove goes to great lengths to make charitable concessions for the differences between professional historical scholarship and “[t]he rhetorical conventions of legal writing,” which “are shaped by advocatorial and even adversarial norms.” Jack N. Rakove, *The Super-Legality of the Constitution, or, a Federalist Critique of Bruce Ackerman’s Neo-Federalism*, 108 YALE L.J. 1931, 1936 (1999). Rakove concludes that *We the People* nevertheless exposes itself to the charge “that it is, in the end, yet another exercise in the partial appropriation of historical materials for theoretical ends.” *Id.* at 1958 (“[I]f nothing else, *We the People* is as advocatorial a work of normative constitutional theory as one can ever imagine encountering.”). In a review of *We the People: Volume II* and a work by Akhil Amar, Rakove makes similar points. See Jack N. Rakove, *Two Foxes in the Forest of History*, 11 YALE J.L. & HUMAN. 191, 195 (1999) (reviewing AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998)) (“While the conventions of legal scholarship need not and often do not mirror the conventions of legal argument, one sometimes has the impression that the realms of academic and professional writing do overlap in significant ways.”); *id.* at 203 (“[N]o conventional constitutional historian would ever dream of developing a general theory of transformation capable of subsuming three such disparate events [*i.e.*, the Founding, Reconstruction, and the New Deal] under one heading[.]”); *id.* at 209 (concluding that “Ackerman’s model . . . is linked much more to its normative pretensions . . . than to its academic and analytical conventions”); *id.* at 211 (criticizing Ackerman’s presentation of *Brown* as merely a synthesis of earlier higher lawmaking by noting: “to characterize the changes in race relations in the 1950s and 1960s as less than transformative—or as merely synthetic of the constitutional changes of the 1930s—seems a remarkably stunted assessment of their impact on our politics and jurisprudence alike”). By presenting the civil rights revolution as a constitutional moment in *We the People: Volume III*, Ackerman appears to have abandoned the argument, criticized by Klarman and Rakove, that *Brown* was merely a synthesis of Reconstruction and New Deal higher lawmaking. Compare ACKERMAN, *FOUNDATIONS*, *supra* note 101, at 137, 141 (rejecting view of *Brown* as “an exercise in constitutional politics” and presenting the decision as preservationist synthesis), with ACKERMAN, *CIVIL RIGHTS REVOLUTION*, *supra* note 101, at 48 (presenting *Brown* as a “constitutional signal,” that is, the beginning of a constitutional moment), and *id.* at 76 (assuming the existence of a “newly established New Deal–Civil Rights constitution” by 1968). It is now unclear whether Ackerman would present *Brown* as correctly decided under the Constitution in 1954.

¹¹⁹ Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 933 (1992).

One sees Ackerman's constitutional fundamentalism most clearly in his lawyerly evasions of historical evidence suggesting that the American people have often disagreed profoundly with his progressive ideals. Michael McConnell and others have thoroughly documented the extent to which the Jim Crow Era was indeed a sustained era in our constitutional history, one characterized by virulent, deep-rooted racism.¹²⁰ The racist regime was powerfully reflected in all branches of government and enjoyed the support of the majority of the American public.¹²¹ McConnell argues in detail that "the end of Reconstruction precisely fits Ackerman's model of a constitutional moment, meeting all four of his criteria."¹²² Yet Ackerman does not so much as acknowledge the possibility of a Jim Crow Republic in *We the People: Volume I*. In response to McConnell's arguments, Ackerman includes a lengthy footnote in *Volume II*, continuing to insist on technical violations that prevent the Jim Crow Era from representing a constitutional moment.¹²³

These sophisticated maneuvers ring especially hollow, however, in light of *Volume III*, where Ackerman shows himself willing to revise earlier technical requirements and aspects of his grand historical narrative in order to proclaim that the civil rights movement was an instance of higher lawmaking.¹²⁴ Why is Ackerman willing to make revisions to his scheme in order to admit the abolition of Jim Crow as a constitutional moment, but not willing to do the same for the

¹²⁰ See Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 116 (1994) [hereinafter McConnell, *Forgotten*] ("[F]or almost eighty years of our history, from 1877 until 1954 (if not longer), the constitutional principles actually put into practice had nothing to do with any of the constitutional moments recognized by the theory, but were in direct repudiation of the principles of the Reconstruction Amendments."); see generally Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303 (1998). As an illustration of the pervasiveness of fundamentalism among constitutional theorists, I note that McConnell, after criticizing Ackerman's wishful thinking regarding Jim Crow, arguably displays his own wishful thinking by defending the correctness of *Brown* as an originalist interpretation of the Fourteenth Amendment. See Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1928 (1995) ("It is not surprising that Professor McConnell undertook his originalist defense of *Brown*. As he states in his introduction, any constitutional theory unable to accommodate *Brown* 'is seriously discredited.'" (quoting Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995)); cf. McConnell, *Forgotten*, *supra* note 120, at 142 n.93 (1994) ("My own view is that the political principles of the Reconstruction Amendments were simply an extension of the fundamental principles of the Founding, which, because of slavery, had never been fully achieved.").

¹²¹ See, e.g., BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 75, at 202 ("The Jim Crow republic was the result of an American politics and constitutional culture that installed judges and Supreme Court justices who legitimized the dehumanization of their fellow citizens for decades.").

¹²² See McConnell, *Forgotten*, *supra* note 120, at 122.

¹²³ See ACKERMAN, TRANSFORMATIONS, *supra* note 101, at 471–74 n.126.

¹²⁴ See ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 101, at 41 (noting that the Second Reconstruction used a different "institutional grammar" from previous constitutional moments); *id.* at 47 (replacing four-stage model of constitutional moment introduced in ACKERMAN, FOUNDATIONS, *supra* note 101, at 266–67 with new six-stage model).

institutionalization of Jim Crow? One strongly suspects it is because Ackerman wants the former to play a central role in our constitutional identity, and does not want the latter to do so. Despite his protestations, his constitutional interpretations appear to be the result of prescriptive reasoning about what the Constitution *should* contain as well as descriptive reasoning about what it *does* contain.

Another illustration of Ackerman's constitutional fundamentalism can be found in his insistence that the Reagan Era has not been a constitutional moment—not even a lesser one. An anecdote from Laurence Tribe gives a sense of Ackerman's underlying commitments:

[T]he political earthquake represented by the ascendancy of the Republican Party to the control of both Houses of Congress in November 1994 for the first time in 40 years can hardly be ignored by someone with Professor Ackerman's views. Yet, when the newly composed House of Representatives took the comparatively modest step . . . of requiring that any increase in income tax rates, before it is deemed to have passed the House, must receive a three-fifths majority, . . . Professor Ackerman first opined that this was certainly unconstitutional (despite the Constitution's silence on this precise point) . . . and then launched a lawsuit on behalf of some members of the House of Representatives seeking a judicial declaration that his view is correct.¹²⁵

¹²⁵ Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1300 n.250 (1995) [hereinafter Tribe, *Taking Text and Structure Seriously*] (citations omitted); see also Mark Tushnet, *Living in A Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845, 847 (1996) (considering evidence for the 1994 elections and the [Republican's] "Contract" with America as elements of a constitutional moment, while recognizing that Ackerman's formal criteria for a constitutional moment had not been satisfied). Of course, Ackerman's work as a legal advocate does not provide evidence of advocacy in his scholarship.

In the interest of completeness, I also note that Tribe, like McConnell, could be described as a constitutional fundamentalist, as Henry Monaghan argued in different terms over three decades ago. See Monaghan, *supra* note 2, at 353; compare Richard A. Posner, *The Constitution As Mirror: Tribe's Constitutional Choices*, 84 MICH. L. REV. 551 (1986) (presenting Tribe as arguing "in effect and often in words close to these, that the Constitution is what we want it to be (hence 'choices') and that what we should want it to be is the charter of a radically egalitarian society"), and ROBERT H. BORK, *THE TEMPTING OF AMERICA* 199, 355 (1990) (criticizing Tribe and other theorists for succumbing to "the temptations of utopia," and arguing that "Tribe's constitutional theory is difficult to describe, for it is protean and takes whatever form is necessary at the moment to reach a desired result"), with Tribe, *Taking Text and Structure Seriously*, *supra* note 125, at 1224–25 ("I continue to hold the view—or perhaps adhere to the faith—that there are legal truths out there . . . and that legal discourse itself imposes serious constraints," such that constitutional law is not "merely a language for pressing one's preferences."), and *id.* at 1235–49 (interpreting the Constitution through the lens of mathematical topology). Tribe's more recent work uses

Ackerman continues to protest in *Volume II*, however, that he is evaluating the Reagan Revolution in a purely disinterested, ideologically neutral fashion, and that it simply happens not to qualify as a constitutional moment according to the relevant historical precedents:

We will not always like what we see. As this project took shape during the 1980's . . . [a]s a liberal committed to social justice, I was not amused at the prospect of playing into the hands of the Reagan Revolution.

But I was determined to publish nonetheless. The Constitution is not the exclusive possession of those who share my politics. . . .

. . . .

During the 1980's, . . . I would not join my fellow liberals on the field of constitutional polemics—castigating the Rehnquist Court and all its works, and insisting that the Warren Court had gotten the Constitution right once and for all. . . . I owed it to my fellow citizens to test the Reagan years against the

carefully hedged language that leaves unclear whether he views his conclusions as dictated purely by neutral methods, or rather as shaped by his thoughts on what the Constitution ought to mean. *See, e.g.,* LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 32 (2008) (denying that “[t]his book” is “a selective brief in support of rights widely associated with the cultural and political Left”); *id.* at 26, 34 (acknowledging some degree of indeterminacy in constitutional meaning, yet noting that “we cannot find in the invisible Constitution anything and everything we might wish”); *id.* at 36 (insisting that “the illumination of the invisible Constitution [is] subject to nonarbitrary, although contestable, constraints,” and that “we may, and do, reach conclusions about the more controversial contents of the invisible Constitution—conclusions that we may evaluate . . . in accordance with criteria that go beyond mere personal preference”); *id.* at 37, 42 (acknowledging, however, that “[r]easoning about the invisible Constitution’s contents must, of course, be channeled to some degree by subjective considerations,” and recognizing that “my beliefs about the substance of the invisible Constitution . . . figure occasionally in what follows,” but nevertheless insisting that the interpretation of the invisible Constitution “must . . . be disciplined and driven by more than desired results”); *id.* at 40–41 (arguing that recognition of the invisible Constitution supports some conservative and some progressive claims, but that “the invisible Constitution’s reality” is a “truth” that can only be denied through “pretense”); *id.* at 43 (arguing that the invisible Constitution is linked with certain “values that are not inherently ‘liberal’ or inherently ‘conservative’ but are broadly committed to the dignity of the human person and the flourishing of humane aspirations”); *id.* at 155 (identifying “six distinct but overlapping modes of construction in forming the invisible Constitution: *geometric, geodesic, global, geological, gravitational, and gyroscopic*”); *id.* at 135, 193 (ultimately concluding, for example, that the invisible Constitution “prevent[s] the state from interfering in the consensual sexual intimacies of couples acting in private, regardless of their gender or sexual orientation,” and that “the premises of self-government might entail embrace of substantive liberties such as reproductive freedom”).

relevant constitutional benchmarks—in particular, the Roosevelt years.¹²⁶

In the end, Ackerman refuses to recognize a constitutional moment in the Reagan Revolution—despite the fact that the Reagan Administration promoted itself as the vehicle for a new vision of governance that would break with the existing regime, including its (“activist”) understanding of the Constitution; despite this new vision of governance becoming the subject of focused public dispute and interbranch conflict; despite the proponents of the vision achieving repeated electoral victories in part because of it; and despite the fact that ultimately even the vision’s partisan opponents came to acquiesce in it, including its (“originalist”) constitutional commitments.¹²⁷ One suspects that a conservative Ackerman could have found some way to describe the preceding developments as an instance of successful constitutional politics.

In sum, while Ackerman has seemed eager to seize upon sometimes questionable historical evidence that supported the formal classification of the New Deal and the Second Reconstruction as successful constitutional moments,¹²⁸ he has seemed less willing to perform such innovative interpretations on behalf of the Jim Crow Era or the Reagan Revolution. Yet he insists upon the ideological neutrality of his constitutional interpretations. Like Justice Scalia and so many others, he has adopted a constitutional fundamentalist stance.

¹²⁶ ACKERMAN, *TRANSFORMATIONS*, *supra* note 101, at 419; *see also id.* at 420 (“Whatever happens, it will be the task of constitutional lawyers to judge the new movement by the benchmarks of the past—and tell the truth, as best they can, to their fellow citizens.”).

¹²⁷ Compare President Ronald Reagan, First Inaugural Address (Jan. 20, 1981), <http://www.presidency.ucsb.edu/ws/?pid=43130> (“In this present crisis, government is not the solution to our problem; government is the problem.”), with President William J. Clinton, 1996 State of the Union Address (Jan. 23, 1996), <http://www.presidency.ucsb.edu/ws/index.php?pid=53091> (“The era of big government is over.”). For an indication of the rhetorical triumph of “originalism,” *see*, for example, BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 75, at 3–4.

¹²⁸ *See, e.g.*, William E. Leuchtenburg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 YALE L.J. 2077, 2111 (1999) (concluding after voluminous review of historical evidence that “all of these considerations fail to demonstrate the validity of Ackerman’s implication that in 1936 the voters were consciously amending the Constitution”); ACKERMAN, *CIVIL RIGHTS REVOLUTION*, *supra* note 101, at 70–72 (presenting 1964 presidential election as a “triggering election” for the civil rights revolution, even though other issues were prominent and many Southern Democrats apparently voted for Johnson as the candidate of the party and the region, rather than based on support for civil rights); BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 75, at 240–41 (noting that Roosevelt did not present himself as seeking to *amend* the Constitution but to uphold its “text . . . and its commonsense purposes” against the Supreme Court’s misinterpretations).

C. *Constitutional Atheism*

A legal atheist is someone who agrees with legal fundamentalists that statements of the law in legal discourse aim to be purely descriptive, and ask to be evaluated based solely on their descriptive accuracy. But the legal atheist also typically believes that the law is so pervaded by indeterminacy, underdetermination, and inconsistency that such descriptive accuracy is rarely possible. As a result, when the legal atheist encounters a typical legal conclusion—stated as a straightforward description, but arising out of a swirling brew of description and prescription, disinterested reasoning and hope—the legal atheist will most often conclude that the claim is simply inaccurate as a description of what the law is.

By extension, a constitutional atheist could be described as someone who agrees with constitutional fundamentalists that legal statements of the meaning of the Constitution should simply describe what is in the Constitution, not what they believe should be there. Unlike constitutional fundamentalists, however, the constitutional atheist believes that nearly all constitutional interpretations in interesting or hard cases are insufficiently justified by the available legal materials. Legal interpretations of the Constitution in these cases assert the existence of determinate answers that can be discerned through the application of ideologically neutral interpretive tools, when in fact no such answers exist. Like a religious atheist observing a debate between two religious believers over the existence or non-existence of various deities, a constitutional atheist confronted with a legal debate between proponents of conservative and progressive readings of some hotly contested constitutional provision will find the spectacle at best amusing, more likely embarrassing, and at worst evidence of intellectual corruption. It is clear to the constitutional atheist that the views of the participants in the constitutional debate are obviously, profoundly shaped by their (ideological) views of what the Constitution *should* mean. Because the participants nevertheless present their views in the form of assertions about what the Constitution *does* mean, the constitutional atheist can hardly resist perceiving those views as erroneous, deluded, or perhaps even fraudulent.

If the constitutional fundamentalist insists that his views have nothing to do with his personal ideological preferences, and that he arrived at his understanding of the Constitution not because that understanding favors his preferences—although it does—but simply because it happens to be *the correct understanding*, the constitutional atheist may wonder, incredulously: What does it even mean to say that one interpretive approach to the Constitution on this issue is *the correct one*, when there are quite evidently so many different approaches to choose from? And could any thinking human being be so blind to his own motivated reasoning that he truly believes the Constitution just happens to require, again and again, what he would wish it to require? Does the progressive constitutional fundamentalist think it is merely a grand coincidence that year after year, in debate after constitutional debate, he finds that the Constitution demands progressive outcomes, while conservative constitutional

interpreters who seem no less professionally competent than himself reach the contrary conclusion?

The constitutional atheist has these responses because she lacks the fundamentalist's *faith*. Where the fundamentalist sees evidence of the Constitution's profound wisdom,¹²⁹ and the non-fundamentalist may see proof of the Constitution's redemptive potential, the atheist sees only belief in self-serving myths. The constitutional atheist believes we would be better off confronting the Constitution as it actually is, stripped of our childish illusions, even if the result is ideologically embarrassing or offers relatively little legal guidance or constraint.¹³⁰ This skepticism toward inherited myths, the atheist believes, is what intellectual maturity demands. We must cast off our comforting self-deceptions and face reality as it truly is in all its unforgiving harshness.

The most wide-ranging and influential statement of constitutional atheism remains Mark Tushnet's recently reissued 1988 book, *Red, White, and Blue: A Critical Analysis of Constitutional Law*.¹³¹ Tushnet addresses each of the

¹²⁹ If the atheist's view of constitutional indeterminacy is correct, it might also cast an unflattering light on the spectacle of constitutional interpreters praising the timeless wisdom of the Constitution. To the extent that they ventriloquize their own preferences through the Constitution's antique wooden mouth, and then praise the resulting commands, they praise their own wisdom.

¹³⁰ From the progressives onward, those scholars who have been most open to the possibility that the ideological content of the Constitution might be anti-democratic, oligarchic, racist, or otherwise undesirable from a contemporary liberal point of view, have naturally tended to oppose allowing the "dead hand" of these retrograde commitments to constrain our current politics. See, e.g., Klarman, *supra* note 10, at 381, 383–84. No judge or theorist, to my knowledge, has endorsed the position that the Constitution requires generally highly repugnant outcomes with regard to rights and classifications, but nevertheless must be obeyed because it is the law. This is itself an indication of the intermingling of descriptive and prescriptive reasoning that pervades legal thought on the Constitution. It is also suggestive that while leftist scholars have produced innumerable works condemning the relentless misdeeds of American governments since the Founding, no legal theorist, so far as I know, has produced a detailed, speculative compendium of constitutional rights-doctrine derived from this leftist counter-narrative of American history. There appears to be no room in the legal academic conversation, or at least no demand, for a detailed attempt at a purely descriptive doctrinal elaboration of "our white supremacist oligarchic Constitution," or what might simply be called "our appalling Constitution," "the Constitution no one wants"—the constitutional meanings that America's institutional power structures, as understood by their leftist academic critics, naturally would have produced.

¹³¹ MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (2d ed. 2015) [hereinafter TUSHNET, RED, WHITE, AND BLUE]. The book incorporates and builds on Tushnet's canonical article applying the mostly private-law-based arguments of the Critical Legal Studies movement to constitutional law. See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). In an Afterword to the second edition, Tushnet summarizes developments in constitutional theory and especially originalism since 1988, concluding that it remains the case that none of the approaches to constitutional interpretation that he has surveyed "accomplished the goals their adherents set for themselves—to authorize and constrain constitutional interpretation, primarily by the courts." See TUSHNET, RED, WHITE, AND BLUE, *supra* note 131, at 338. In other words, he would see no reason to change the book's original conclusion: "Critique is all there is." See *id.*

leading grand constitutional theories of the era, suggesting that none of them can “be made coherent.”¹³² A large part of Tushnet’s argument rests on the notion that there are deep, irreconcilable ideological conflicts in American political culture and constitutional thought.¹³³ But Tushnet also returns repeatedly to the indeterminacy of each theory, the extent to which “the maximum coherent content” of each theory, based on its premises, is “limited.”¹³⁴ Each theory purports to constrain judges, yet upon closer inspection, the constraints imposed are surprisingly weak.

For example, some originalists would have us rely on the Framers’ meanings, but the interpretive reconstruction of these meanings will lack the “determinacy” needed to satisfy originalism’s “underlying goals.”¹³⁵ Moreover, “few people today believe that phrases like *due process of law* or *the freedom of speech* have the kind of plain meaning that the framers believed they had.”¹³⁶ It is true that “Justice Hugo Black did say that, but . . . nobody believed him,” and when conservatives attempt to “reiterate this position today, . . . it is simply a lie.”¹³⁷ “[R]adical indeterminacy of meaning is, within a liberal community,

¹³² TUSHNET, RED, WHITE, AND BLUE, *supra* note 131, at 179.

¹³³ See generally TUSHNET, RED, WHITE, AND BLUE, *supra* note 131.

¹³⁴ *Id.* As Tushnet summarizes his perspective elsewhere:

Constitutional theories . . . have no determinate or even interesting result-based content. There is right-wing originalism and left-wing originalism. There is right-wing natural law and left-wing natural law. There is right-wing “representation-reinforcing review” and left-wing “representation-reinforcing review.” And . . . there is right-wing Dworkinism and left-wing Dworkinism.

Mark V. Tushnet, *Does Constitutional Theory Matter?: A Comment*, 65 TEX. L. REV. 777, 782–83 (1987).

¹³⁵ TUSHNET, RED, WHITE, AND BLUE, *supra* note 131, at 41; see also *id.* at 43 (noting “the indeterminacy of identifications of functional equivalents” in originalism); *id.* at 57 (noting that his critiques of originalism and “neutral principles” “have argued that there are no determinate continuities derivable from history or legal principle”). For other examples of Tushnet criticizing the indeterminacy and resulting lack of constraint of grand constitutional theories, see *id.* at 66 (arguing that one theorist’s textualism “allows us to proliferate underlying values essentially at will and then provides no constraints on the courts in choosing how to accommodate this plurality of values in any particular case”); *id.* at 99 (arguing that Ely’s representation reinforcement “leaves the judges unconstrained”); *id.* at 118 (arguing that there is a recurring difficulty in “drawing conclusions about particular problems from the high-level abstractions of systematic moral philosophy”); *id.* at 164 (arguing that the appeal to public values in theorists like Fiss, Michelman, and Sunstein “rarely gives content to the public values it invokes”); *id.* at 176 (arguing that “Perry and Tribe do not overcome the difficulty that the existence of a plurality of traditions poses for their traditionalism”); *id.* at 182 (arguing that the eclectic combination of grand theories remains indeterminate in the absence of a higher theory); *id.* at 183 (arguing that intuitive “balancing” based on judges’ candor and sensitive perceptions “really does not constrain the judges”).

¹³⁶ *Id.* at 24.

¹³⁷ *Id.* at 24 n.14. Indeed, no discussion of constitutional fundamentalism would be complete without some reference to Justice Hugo Black, who seems to fulfill the criteria of constitutional fundamentalism almost no matter how they are defined. As early as 1961, a writer in the Columbia

inevitable.”¹³⁸ Even with regard to the “mathematical” provisions of the Constitution, such as the requirement that the President be at least 35 years old, Tushnet denies that the text is ahistorically clear. He observes that under the right set of political circumstances, even ostensibly “easy cases” involving these provisions might become hard cases.¹³⁹

Tushnet’s arguments not only parallel the content of religious atheism, as defined above, but often echo religious atheism’s tone. Nothing is sacred in the atheist’s view of constitutional interpretation. Lacking faith, he sometimes finds it difficult even to take seriously the contentions of the noisily competing faithful. Playful mockery alternates with exasperated criticism and occasional scorn, as in Tushnet’s accusation of conservative fraud and the irony he directs toward Justice Black’s constitutional fundamentalism.¹⁴⁰

A more recent expression of constitutional atheism can be found in Louis Michael Seidman’s *On Constitutional Disobedience*.¹⁴¹ Seidman argues that we should stop pretending we owe an obligation of obedience to the Constitution, and that we should instead simply do what we believe to be right, all things considered: “[W]hy should we take another course of action just because of words written down on a piece of paper more than two hundred years ago?”¹⁴² Like a religious atheist calling upon believers to abandon their reliance on archaic commands in a long-ago religious text, and instead simply to do what is *right*, Seidman encourages We the People to free ourselves from the shackles of constitutional religion and to chart our own course through history. “We should give up on the pernicious myth that we are bound in conscience to obey the commands of people who died several hundred years ago.”¹⁴³ Again echoing a

Law Review referred to Justice Black as a “constitutional fundamentalist,” probably with assumed reference to the Justice’s insistence on the literal meaning of constitutional phrases such as “Congress shall make *no law* . . . abridging the freedom of speech . . .” See Murray A. Gordon, *Justices Black and Frankfurter: Conflict in the Court*, 61 COLUM. L. REV. 1537, 1539 (1961); Sanford Levinson, *Judicial Engagement in Enforcing Limits on Government Power*, 19 GEO. MASON L. REV. 973, 980 & n.45 (2012) (citing ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 491 (2d ed. 1997)).

¹³⁸ TUSHNET, RED, WHITE, AND BLUE, *supra* note 131, at 63.

¹³⁹ See *id.* at 60–62 (discussing circumstances in which the counting of votes in the electoral college for a sixteen-year-old guru could become a “hard case”).

¹⁴⁰ See also Mark V. Tushnet, *The New Marketplace of Ideas: A Review of Reconstructing American Law by Bruce Ackerman*, 79 NW. U. L. REV. 857, 857 (1984) (expressing initial exasperation “close to outrage” toward a “pompous and smug” new work by Bruce Ackerman); Mark Tushnet, *Treatise Writing During Constitutional Moments*, 22 CONST. COMMENT. 251, 251 & n.2 (2005) (noting that he once wrote “what in the legal academy counts as a notorious review of the first edition of Laurence Tribe’s treatise” and citing Mark Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694 (1980)).

¹⁴¹ See SEIDMAN, *supra* note 10.

¹⁴² *Id.* at 7.

¹⁴³ *Id.* at 9.

religious atheist, Seidman views the premises of faith as nothing more than myths, and encourages us to discard them.¹⁴⁴

Seidman's constitutional atheism rests, like Tushnet's, in part on a belief in the widespread indeterminacy of constitutional meaning.¹⁴⁵ This indeterminacy leaves room for competing advocates to fill in the constitutional silences with their own ideological preferences. In characteristic atheist fashion, Seidman presents the smuggling of ideological preferences into ostensibly descriptive constitutional interpretation as illegitimate: "If 'due process' means whatever contemporaries think that it *ought* to mean, then we are no longer bound by constitutional language in a meaningful sense."¹⁴⁶

Against the discordant choir of prominent scholars, judges, and legal activists defending varieties of constitutional fundamentalism, the number of

¹⁴⁴ See also *id.* at 10 ("Does the success of our country really depend on belief in a myth?"). A particular target of Seidman's critique is what might be called bad faith constitutionalism, in which the believer pretends that he is not free to choose otherwise, because the Constitution has already made the choice for him. *Id.* at 7, 28; cf. Kennedy, *The Hermeneutics of Suspicion*, *supra* note 61, at 133–34 ("The legalist jurist [displays Sartrean bad faith] when he denies the role of his ideological predilections in generating the outcome he will justify in the language of legal necessity."). Kennedy quotes Judge Posner using the same language:

But the choice of that interpretive rule is not something that can be derived by reasoning from agreed-upon premises. The originalist's pretense that it can be makes originalism an example of bad faith in Sartre's sense—bad faith as the denial of freedom to choose, and so shirking of personal responsibility. Similar examples abound at the liberal end of the ideological spectrum.

Id. at 134 (quoting POSNER, *supra* note 11, at 104).

¹⁴⁵ See, e.g., SEIDMAN, *supra* note 10, at 6 (noting that "at this late date, we cannot know what the people's voice actually said" in the ratification of the Constitution).

¹⁴⁶ SEIDMAN, *supra* note 10, at 13 (emphasis added). I note that there is also a respect in which the label of constitutional atheist does not quite fit Seidman's book. While Seidman takes no position on Tushnet's argument that even the mathematical provisions of the Constitution could be made indeterminate under sufficiently strange political circumstances, he emphasizes that under *our* circumstances, some provisions of the Constitution are, in Sanford Levinson's phrase, "hard wired." *Id.* at 12–13. With respect to these hard-wired aspects, Seidman might (half-jokingly) be described less as a constitutional atheist and more as a constitutional *satanist*. That is, with regard to these especially pernicious because especially unmovable features of the constitutional landscape, Seidman believes that it is possible to listen to the Constitution's voice without merely discovering an echo of our own. *Id.* In fact, he believes the Constitution speaks all too clearly on these points. Seidman asks us to turn our backs on these portions of the Constitution and to refuse to grant them any dominion over us. *Id.* He is of the Devil's party, acknowledging the existence of God's commands but urging rebellion against them. *Id.*

The abolitionist William Lloyd Garrison might also be seen as a kind of constitutional satanist. He understood the antebellum Constitution as irredeemably protective of slavery and as a result called for its destruction. As an especially crafty satanist, however, Garrison attempted to turn the tables on the constitutional faithful by referring to the Constitution itself as Satan's work, labelling it "a covenant with Death, and an agreement with Hell." See BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 75, at 5 (citing WALTER M. MERRILL, *AGAINST WIND AND TIDE: A BIOGRAPHY OF WILLIAM LLOYD GARRISON* 205 (1963)).

vocal constitutional atheists is small.¹⁴⁷ This should be no surprise. First, legal practitioners are unlikely to leave traces of constitutional atheism in their arguments because doing so would usually be a very ineffective rhetorical strategy. A constitutional believer, whether fundamentalist or non-fundamentalist, is at least potentially able to argue with sincerity and conviction, and not only as a performance, that the Constitution *demand*s her preferred judicial outcome, while the uncompromisingly candid constitutional atheist may only be able to respond, disappointingly, that the issue is unclear because the meaning of the Constitution cannot be determined. No matter how descriptively accurate the atheist's description of the situation, the use of such descriptions will rarely be the most effective way of achieving practical legal goals.

Second, with regard to both religious and constitutional faith, those who refuse to worship because they lack belief are less likely to spend their scarce time and energy debating the details of what they do not believe. A constitutional atheist may occasionally find it worthwhile to explain why the believers are wrong. But to the extent that constitutional faith does not rest on ordinary evidence and thus resists rational contestation—in other words, to the extent that constitutional faith is indeed a *faith*—the atheist's criticisms are unlikely to have much effect.¹⁴⁸ Once the constitutional atheist completes her explanation of the

¹⁴⁷ For one of the rare examples of something approaching constitutional atheism in a Supreme Court opinion, see *Boumediene v. Bush*, 553 U.S. 723, 752 (2008) (Kennedy, J.) (noting “[t]here are reasons to doubt” “that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us,” and partly in light of this indeterminacy, reaching a decision based instead on prudential considerations). Even in *Boumediene*, Justice Kennedy hardly states in explicit terms that he is determining the meaning of the Constitution based in part, for lack of a better alternative, on his own personal prudential views of what the Constitution should require.

¹⁴⁸ On the resistance of religious belief to rational contestation, see, for example, BRIAN LEITER, *WHY TOLERATE RELIGION?* 81 (2013) (noting that “some religious beliefs are *insulated from evidence*”); Gregory Brazeal, *Web of Faith as a Source of Reasonable Disagreement*, 23 CRITICAL REV. 421, 423–33 (2011) (describing a mechanism by which some religious beliefs might resist rational challenge).

believers' errors,¹⁴⁹ there will be little left to say, and the atheist will have good reason to move on.¹⁵⁰

D. Constitutional Faith Without Fundamentalism

The non-fundamentalist constitutional believer accepts the constitutional atheist's premise that constitutional meaning, at least with regard to the Constitution's rights provisions, is profoundly logically imperfect. But the constitutional non-fundamentalist also recognizes, unlike both the fundamentalist and the atheist, that there is something special about the way that legal assertions of the meaning of the Constitution ("constitutional interpretations") work, as opposed to scholarly historical claims about the Constitution and its contents. The non-fundamentalist constitutional believer accepts that it is proper for constitutional interpretations, like legal discourse in general, to involve an undifferentiated blending of description and prescription. As a result, the non-fundamentalist can in good faith fill any logical imperfection created by her methods of interpretation with determinacy supplied by her own convictions, her own vision of how the Constitution should be interpreted and what it should contain.

¹⁴⁹ The attitude of the atheist toward the *non*-fundamentalist believer is less clear, perhaps because explicit theoretical expressions of non-fundamentalist faith are so rare. One possibility would be for the atheist to regard the non-fundamentalist believer as merely engaged in cynical play-acting, or a bad-faith renunciation of agency. The atheist might view the non-fundamentalist as sharing the point of view of the schoolboy who, according to William James, defined faith as "when you believe something that you know ain't true." William James, *The Will to Believe*, in *WRITINGS 1878–1899* (Gerald E. Myers ed., 1992). From this perspective, the non-fundamentalist's persistence in belief despite the lack of ordinary reasons for belief is like the continuing embrace of ideology by the modern "cynical subject":

Peter Sloterdijk puts forward the thesis that ideology's dominant mode of functioning [today] is cynical The cynical subject is quite aware of the distance between the ideological mask and the social reality, but he none the less still insists upon the mask. The formula . . . would then be: "they know very well what they are doing, but still, they are doing it." Cynical reason is no longer naïve, but is a paradox of an enlightened false consciousness: one knows the falsehood very well, one is well aware of a particular interest hidden behind an ideological universality, but still one does not renounce it.

SLAVOJ ŽIŽEK, *THE SUBLIME OBJECT OF IDEOLOGY* 28 (1989) (citing PETER SLOTERDIJK, *THE CRITIQUE OF CYNICAL REASON* (1983)). For Tushnet's critique of some aspects of Balkin's non-fundamentalist project, see TUSHNET, *RED, WHITE, AND BLUE*, *supra* note 131, at 326 (suggesting that Balkin's *LIVING ORIGINALISM* "uses its own version of originalism . . . to defend every result contemporary liberals hope to get out of the Constitution"); Mark Tushnet, *Self-Historicism*, 38 *TULSA L. REV.* 771 (2003).

¹⁵⁰ See Mark V. Tushnet, *Constitutional Scholarship: What's Next?*, 5 *CONST. COMMENT.* 28, 32 (1988) (noting that he has "just published a book on constitutional theory that [he] unsurprisingly but undoubtedly erroneously regard as the last word on the subject," and concluding that it is therefore time "to start doing something else").

The constitutional non-fundamentalist has *faith* in her vision of the Constitution. She does not believe it is true in the same sense or on the same basis as a historical scholar believes a scholarly claim about the Constitution's ratification or amendment to be true. She believes her constitutional faith not based on some deductive or empirical proof available to all disinterested observers, but at least in part on the basis of her own commitments, including ideological commitments. These commitments are not the sort of thing that every reasonable person must accept by virtue of being reasonable. They are more historically contingent and personal. We might say that the constitutional non-fundamentalist has arrived at the constitutional vision that partly motivates her interpretations through a leap of faith. She has not relied entirely on reasoning from neutral principles.

Like a constitutional fundamentalist, someone with a non-fundamentalist constitutional faith might rely on any number of interpretive methodologies and might favor outcomes of any political valence. In arguing for her constitutional interpretations, she might appeal, for example, to constitutional text, structure, original understanding, precedent, or the principles of American democracy. Indeed, she is free, as is the fundamentalist, to adopt interpretive methods that are "off-the-wall" in the eyes of the legal profession.¹⁵¹ Non-fundamentalism does not imply a commitment to or rejection of any particular approach to determining constitutional meaning. It is an attitude toward a constitutional interpretation, an attitude that acknowledges the intermingling of the descriptive and the prescriptive in legal assertions about what the Constitution means, and accepts this intermingling as legitimate, as a part of the form of life in which one engages when one makes constitutional interpretations.

A non-fundamentalist judge would reject the constitutional fundamentalist's belief that he is nothing more than a neutral umpire, calling balls and strikes without any concern for their effect. From the non-fundamentalist's point of view, such neutrality is not only an impossible basis for reaching constitutional decisions in many cases but is simply not how the practice of *constitutional interpretation*—as a type of legal discourse—works. The umpire analogy, in the eyes of the non-fundamentalist, reflects a basic misunderstanding of the nature of constitutional adjudication, as opposed to scholarly historical or sociological analysis.

The difference between a fundamentalist and non-fundamentalist attitude toward a constitutional interpretation may not be apparent simply by looking at the words of a constitutional advocate in court or of a judge in an opinion. In theory, a fundamentalist and non-fundamentalist might present identical arguments leading to identical conclusions. Discerning the difference in attitude might require asking questions in order to determine whether the

¹⁵¹ See BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 75, at 179–82 (discussing off-the-wall versus on-the-wall constitutional arguments, and the historical forces that can shift an argument from off-the-wall to on-the-wall and vice versa).

speaker recognizes that her view of the Constitution's meaning is not the same as a neutral description, but is rather premised in part on her prescriptive commitments, or whether she acknowledges that her interpretation was shaped by her conception of what is just or fair, her role as an advocate, or some other source of prescriptive reasoning.¹⁵²

As already noted,¹⁵³ where one finds the distinction between constitutional fundamentalism and non-fundamentalism made most clearly manifest is in speech and writing that scrutinizes and attempts to make explicit its own methodological assumptions. As we also saw above,¹⁵⁴ examples abound of constitutional fundamentalism in articulations of constitutional theory by legal scholars and judges. Examples of non-fundamentalist constitutional theory, like theoretical expressions of constitutional atheism, are comparatively rare.

The most fully developed expression of non-fundamentalist constitutional faith is Jack Balkin's *Constitutional Redemption*.¹⁵⁵ To begin with, like the constitutional atheist, Balkin acknowledges the logical imperfection of constitutional meaning. His acknowledgement appears in his discussion of "constitutional historicism."¹⁵⁶ He suggests that while

at any point in time legal materials and the internal conventions of constitutional argument genuinely constrain lawyers and judges, these materials and conventions are sufficiently flexible to allow constitutional law to become an important site for political and social struggle The internal norms of good constitutional legal argument are always changing, and they are changed by political, social, and historical forces in ways that the internal norms of legal reasoning do not always directly acknowledge or sufficiently recognize.¹⁵⁷

This acknowledgement that the constitutional interpretations of lawyers, judges, activists, and legal scholars—including Balkin's own interpretations—arise in relation to changeable and frequently shifting interpretive norms already

¹⁵² Just as it may be difficult to determine whether a speaker has a fundamentalist or non-fundamentalist constitutional attitude at first glance, so certain attitudes may conceivably be difficult to classify even upon closer analysis. Cf. Wittgenstein, *Lectures*, *supra* note 25, at 58 ("[T]here can easily be imagined transitions where we wouldn't know for our life whether to call them religious beliefs or scientific beliefs."). But this does not undermine our ability to identify relatively clear cases, and to distinguish fundamentalism from non-fundamentalism conceptually.

¹⁵³ See *supra* Section III.B.

¹⁵⁴ See *supra* Part III.

¹⁵⁵ See BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 75.

¹⁵⁶ *Id.* at 177–79.

¹⁵⁷ *Id.* at 177–78; see also *id.* at 183 (noting that historicism "does not deny that people internal to the practice of constitutional law hold good-faith views about the best interpretation of the Constitution, and it does not deny that, viewed from the standpoint of the participants, some interpretations might be better than others").

sets Balkin apart from the usual constitutional fundamentalist, who denies the indeterminacy of constitutional meaning at least in relation to the subject matter of her own conclusions.

But unlike the atheist, Balkin seems to accept that it is appropriate for a constitutional interpretation to incorporate both descriptive and prescriptive reasoning. On the one hand, Balkin emphasizes that constitutional interpretation is not *purely* prescriptive. It is not solely an expression of what one wishes to be the case. It requires fidelity to the Constitution. Balkin writes that “[t]he rhetoric of legal and political argument alike is premised on the assumption of fidelity. . . .”¹⁵⁸ While in theory someone could disclaim fidelity to the Constitution and argue, for example, that judges should enforce economic equality as a constitutional right because it is a good idea regardless of what the Constitution says, in practice this would violate the norms of constitutional argument. Invoking the Wittgensteinian notion of “language games,” Balkin notes:

[I]nsisting that one does not care about fidelity does not simply put one at a severe disadvantage in convincing others to one’s point of view; it takes one outside of the language game of constitutional interpretation. It is to announce that one is doing something else—whether it is political theory, economics, or sociology, but most assuredly not constitutional law.¹⁵⁹

Similarly, “[f]or a law professor to say that fidelity to the Constitution is unimportant is to admit that she is no longer doing constitutional law; rather, she must say that she is faithful to what the Constitution, properly understood, commands.”¹⁶⁰ This is simply the way the game of constitutional interpretation is played; these are the norms of the practice.¹⁶¹

On the other hand, Balkin seems to recognize that constitutional interpretation, as a form of legal discourse, differs from the purely descriptive discourse of, for example, non-legal scholarship. He remarks that “a political

¹⁵⁸ *Id.* at 105.

¹⁵⁹ *Id.* at 106.

¹⁶⁰ *Id.* at 105. As Balkin also notes:

[C]onstitutional theorists take great pains to demonstrate the fidelity of their favored constitutional doctrines and their favored methods of constitutional interpretation. It is not enough that a theory or a doctrinal innovation is a really good idea; enormous efforts must be expended to show that it is also a faithful interpretation of the Constitution.

Id.

¹⁶¹ Echoing Kennedy, *The Hermeneutics of Suspicion*, *supra* note 61, Balkin notes: “Of course, one sometimes doubts that particular lawyers and politicians really take constitutional fidelity seriously. . . . That is certainly what lawyers and politicians constantly accuse each other of, even as they assert that their own interpretations are faithful.” BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 75, at 105–06.

scientist . . . is not particularly interested in legitimating the present or criticizing the current Supreme Court; instead he is urging his fellow political scientists to take the professional constraints of the law seriously. [Law professors], by contrast, are engaged in normative and defensive projects.”¹⁶² When Balkin notes that “fidelity to our Constitution is manufactured” by the “process of raising arguments and making claims in the name of the Constitution, of persuading people about what the Constitution really means, and attempting to move arguments from off-the-wall to on-the-wall,”¹⁶³ he denies that the Constitution has an ahistorically fixed meaning that could be described with simple, comprehensive accuracy, thereby ending the constitutional conversation once and for all. What the Constitution means, his comments suggest, is properly determined in part by what we think it ought to mean.

The same could not be said of the purely descriptive claims of a political scientist. No matter how much we might acknowledge the potential for ideology or other biases to play a role, perhaps in some contexts an unavoidable one, in shaping a political scientist’s choice of projects and methods, we simply would not say that a political scientist could *properly* allow her view of what should be the case to play a determinative role in shaping her conclusions about what is the case. We do not recognize the propriety of a political scientist, for example, discarding certain statistical evidence because it conflicts with his view of what the world should be like. We view the unacknowledged introduction of personal prescriptive premises into a political scientist’s descriptive conclusions as improper and potentially invalidating.

With regard to constitutional meaning, non-fundamentalists like Balkin suggest, the principle that prescriptive premises should be cordoned off from descriptive-sounding legal conclusions simply does not apply. Nor does he exclude his own constitutional interpretations from his historicism. He does not lapse into a fundamentalist faith in the purely descriptive ahistorical accuracy of his own claims. At the same time, unlike the atheist, he presents himself as *believing* that his claims are faithful to the meaning of the Constitution. He rejects an atheistic attitude of disbelief and the refusal to commit to any particular constitutional understanding:

We believe that our own views are correct; at the same time, we also understand that people’s minds can be changed and have been changed, including our own.

This dual understanding is not self-undermining, and it does not involve us in a performative contradiction . . . If we do nothing, and adopt a cynical relativism that holds that one

¹⁶² BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 75, at 197–98.

¹⁶³ *Id.* at 119.

view is just as good as another, we surrender the constitutional system's fate into the hands of others.¹⁶⁴

I note that Balkin's particular brand of constitutional faith is not logically entailed by the idea of constitutional non-fundamentalism. It arises out of his personal commitment to the redemptive possibilities of the Constitution, and in particular to a progressive vision of constitutional redemption.¹⁶⁵ Balkin expresses faith in the capacity—however dormant—of America's constitutional culture, using the Constitution as an organizing framework, to fulfill the as-yet unfulfilled promises that Balkin (in a combination of historical description and personal hope) believes the Constitution contains. At the same time, he recognizes the evils of the constitutional past and present, the lack of any *guarantee* that the constitutional future will be better, and the risk that faith in the Constitution may distort his own values for the worse.

As Balkin hints in his repeated invocations of a “leap of faith,”¹⁶⁶ his faith in the redemptive potential of the Constitution can be understood in Kierkegaardian terms. Like Kierkegaard's non-fundamentalist “knight of faith,” who recognizes that his faith lacks rational grounds but nevertheless believes “by virtue of the absurd,”¹⁶⁷ Balkin recognizes that his commitment to the Constitution is not supported by a chain of public reasons to which any rational person would inevitably assent if she thought about the Constitution long enough. Rather, Balkin's leap of constitutional faith exceeds what value-neutral reasoning could justify. It springs from a personal commitment to the Constitution and its promise, a commitment that someone lacking faith might well dismiss as absurd.¹⁶⁸

¹⁶⁴ *Id.* at 184.

¹⁶⁵ *Id.* at 18–25 (sketching a vision of American constitutional redemption that, like Lincoln's vision in the Gettysburg Address, places at its core the proposition in the Declaration of Independence “that all men are created equal”).

¹⁶⁶ *Id.* at 6, 48, 84, 124.

¹⁶⁷ See SØREN KIERKEGAARD, *FEAR AND TREMBLING* 40 (C. Stephen Evans & Sylvia Walsh eds., 2006). The non-fundamentalist believer's position that neutral standards of reason provide an inadequate basis for supporting religious belief is also associated with Blaise Pascal. See, e.g., BLAISE PASCAL, *PENSÉES AND OTHER WRITINGS* 157 (Anthony Levi ed., Honor Levi trans., 2008) (“It is the heart that feels God, not reason: that is what faith is.”); *id.* at 65–66 (“I see several opposing religions, all except one of them false. Each wants to be believed on its own authority and threatens those who do not believe. I therefore do not believe them on that account.”). Contemporary philosophers sometimes refer to the denigration of reason as a basis for religious faith as “fideism.”

¹⁶⁸ In a manner that echoes another aspect of some non-fundamentalist approaches to religious faith, Balkin has also defended the value of a certain notion of “myth” against scientific dismissal. In response to Ackerman's denunciation of “what he calls the ‘myth of rediscovery’ in American constitutional law—the notion that we can justify major transformations . . . as a return to original principles and commitments,” Balkin writes:

Balkin's constitutional faith also recognizes, again like the faith of Kierkegaard's exemplary knight,¹⁶⁹ that there is no guarantee that the Constitution's promise will be fulfilled, and no security from the risk that commitment to the Constitution will become idolatry—faith in something that does not deserve our faith:

The Constitution might ultimately let us down, either because its institutions are faulty or because the American people acting through those institutions make unwise decisions and tragic errors. It might ultimately turn out to be Garrison's covenant with death and agreement with hell. Even so, to faithfully interpret the Constitution, we must have faith in the Constitution, and we must take that risk.¹⁷⁰

When Balkin describes the details of his faith in constitutional redemption, he offers an illustration of the way that non-fundamentalist constitutional faith self-consciously blends descriptive and prescriptive aspects. After telling a story of constitutional meaning that deals in part with how the “transformation of society into a truly democratic culture”¹⁷¹ would vindicate promises of the Declaration of Independence, Balkin notes:

So there is the story. I think it is a good story. Perhaps you will disagree. Everything in it is true, as best as I can tell. But of course, I left some things out and emphasized others. I offered my interpretation of the facts, and asked you to agree with my interpretation. That is how one argues with stories.¹⁷²

Unlike a constitutional fundamentalist, Balkin does not present his constitutional theory as a purely descriptive account with which any disinterested observer should agree as a rational matter, regardless of the observer's values. He does not present his interpretation of the Constitution as *neutral*. Rather, he

I disagree that the “myth of rediscovery” is a myth in the pejorative sense that Ackerman means to convey—a false story that obfuscates the truth about social life. Rather, myths are stories that reveal deep verities about the human condition. So it is with our life as a constitutional community.

Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 521–22 (2007); cf., ARMSTRONG, *supra* note 16, at xv–xvii (defending *mythos* as valid alternative to *logos*, rather than failed instance of *logos*).

¹⁶⁹ Kierkegaard's knight of faith recognizes that he takes a risk through his unconditional commitment to his beloved. His beloved, as a finite being, could be lost at any moment, and this loss would destroy him. Yet he commits himself to her anyway, aware of and yet unwilling to be swayed by the sword of Damocles hanging by a thread above her. See KIERKEGAARD, *supra* note 167, at 43.

¹⁷⁰ BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 75, at 125.

¹⁷¹ *Id.* at 25.

¹⁷² *Id.*

acknowledges that the theory is shaped by his personal commitments. As he writes elsewhere, this kind of constitutional theory or story “is true for you because it is part of you, because you see yourself as part of it.”¹⁷³ Nevertheless, he believes the story. Unlike a constitutional atheist, he is able to say that it is true to the meaning of the Constitution.¹⁷⁴

As an expression of non-fundamentalist constitutional faith, Balkin’s theory can also be distinguished from a non-fundamentalist attitude *without* faith. The latter is the as-yet unexplored fourth option made possible by the combination of our two binary variables: fundamentalism versus non-fundamentalism, belief versus non-belief. This Article might itself be seen as an illustration of a non-fundamentalist attitude without faith, in the sense that it makes no legal or constitutional claims, but instead limits itself to purely descriptive, generally anthropological or sociological statements about the law and legal practices. Rather than exploring the many other aspects of Balkin’s theory that might be described as illustrations of constitutional faith without fundamentalism, I would like to close by situating Balkin’s non-fundamentalist faith in constitutional redemption in a larger tradition of American thought. In particular, Balkin’s arguments bear a striking structural resemblance to those made by the philosopher Richard Rorty in his 1998 book *Achieving Our Country*.¹⁷⁵ Like Balkin, Rorty argues that it is possible to reconcile a recognition

¹⁷³ *Id.* at 32.

¹⁷⁴ *See, e.g., id.* at 138. It is worth emphasizing Balkin’s insistence that a constitutional faith cannot *simply* be an expression of one’s own values. It must be faithful *to the Constitution*. *See id.* at 28 (insisting that a narrative argument concerning the meaning of the Constitution does not “simply reduce[]” to an expression of “natural law or best consequences,” but is constrained by fidelity to the promises made by We the People, which may be different than the promises made by a different people with a different history). Indeed, one of the defining characteristics of Balkin’s constitutional faith is his insistence on distinguishing it from the “happy talk” of what he calls “Ideal Constitutionalism,” the attempt

to dissolve the problem of constitutional evil by distinguishing an ideal Constitution from past interpretations of the Constitution and past actions done in the name of the Constitution. It hopes to separate the “real” or “true” Constitution from unworthy parts of the constitutional tradition and even from positive constitutional law.

Id. at 112. As Balkin acknowledges, however, the line between such Ideal Constitutionalism and charitable interpretations of the Constitution, such as the one underlying his own aspirational constitutional faith, is not always clear. He presents Ideal Constitutionalism as an *excessive* form of aspiration, one that denies the reality of constitutional evil even in the past and present, rather than seeing that evil as something to be overcome. “This practice is an exaggeration of a perfectly normal feature of interpretation, and so it is hard to tell where interpretation ends and conformation [that is, improperly conforming the object of interpretation to our sense of what is just,] begins.” *Id.*

¹⁷⁵ RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH-CENTURY AMERICA* (1998) [hereinafter RORTY, *ACHIEVING OUR COUNTRY*]. The title comes from some of the closing lines of James Baldwin’s *The Fire Next Time*:

of the failures and evils of America's past and present with a belief in the promise of America's future.¹⁷⁶ Like Balkin, Rorty prefers to criticize these failures and evils as a betrayal of American ideals than as an embodiment of what America stands for.¹⁷⁷

Perhaps because Rorty tended to abjure religious vocabularies, he presents his argument not as a defense of *faith* but of national *pride*; and perhaps because Rorty was a philosopher working in a comparative literature department rather than a professor of constitutional law, he places a greater emphasis on the writings of Whitman and Dewey than on the text of the Constitution. But like Balkin, Rorty presents his argument as appealing to a *narrative*.¹⁷⁸ Rorty calls for a renewed national pride based on a narrative of hoped-for future progress that avoids both the self-disgusted anti-Americanism associated with the spectatorial academic Left and the "simpleminded militaristic chauvinism" associated with some representations of the United States in popular culture.¹⁷⁹ Like Balkin, Rorty takes inspiration for his favored American narrative in part from the rhetoric of the Gettysburg Address.¹⁸⁰

If we—and now I mean the relatively conscious whites and the relatively conscious blacks, who must, like lovers, insist on, or create, the consciousness of the others—do not falter in our duty now, we may be able, handful that we are, to end the racial nightmare, and achieve our country, and change the history of the world.

JAMES BALDWIN, *THE FIRE NEXT TIME* 119 (1963).

¹⁷⁶ See RORTY, *ACHIEVING OUR COUNTRY*, *supra* note 175, at 3–4 (noting the importance of reminding the "country of what it can take pride in as well as what it should be ashamed of," and criticizing most popular and elite cultural descriptions of America's near future for being "written in tones either of self-mockery or self-disgust").

¹⁷⁷ See *id.* at 3 ("Emotional involvement with one's country—feelings of intense shame or of glowing pride aroused by various parts of its history, and by various present-day national policies—is necessary if political deliberation is to be imaginative and productive."); *id.* at 7 (criticizing those who "associate American patriotism with an endorsement of atrocities").

¹⁷⁸ See *id.* at 3 ("Those who hope to persuade a nation to exert itself . . . must tell inspiring stories about episodes and figures in the nation's past . . ."). Also similar to Balkin, Rorty recognizes that "[s]tories about what a nation has been and should try to be are not attempts at accurate representation, but rather attempts to forge a moral identity." *Id.* at 13; *cf.* BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 75, at 17–32.

¹⁷⁹ RORTY, *ACHIEVING OUR COUNTRY*, *supra* note 175, at 4.

¹⁸⁰ *Id.* at 8. Indeed, Lincoln's use of the Gettysburg Address can itself be seen as a central example of the kind of redemptive reinterpretation of American ideals advocated by Balkin and Rorty. See generally GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* (1992) (presenting the Gettysburg Address as a redemptive reinterpretation of America's constitutional tradition with the commitment to equality in the Declaration of Independence at its foundation). A more recent example appears in President Obama's speech commemorating the fiftieth anniversary of the Selma to Montgomery civil rights marches:

What greater expression of faith in the American experiment than this, what greater form of patriotism is there than the belief that America is not yet finished, that we are strong enough to be self-critical, that each successive

Rorty's call to "achieve our country," rather than assuming it has already been achieved, or viewing America as corrupt to its core and not worth achieving, bears remarkable similarities to Balkin's call to redeem the promises of the American constitutional tradition. Both Rorty and Balkin recognize that their values are the result of historical contingencies rather than being secured by some ahistorical rational foundation. Yet both remain committed to their values and to the project of national redemption.¹⁸¹ Finally, both recognize that the project, by its nature, will never be complete.¹⁸²

An enduring value of Rorty's and Balkin's projects, especially in the current state of our politics,¹⁸³ is to show that belief in a possible narrative of American redemption does not require blindness to past and present American evils.¹⁸⁴ Their projects do not require a fundamentalist denial of what is known

generation can look upon our imperfections and decide that it is in our power to remake this nation to more closely align with our highest ideals?

President Barack Obama, Remarks by the President at the 50th Anniversary of the Selma to Montgomery Marches (Mar. 7, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/03/07/remarks-president-50th-anniversary-selma-montgomery-marches>. Even more recently, Justice Anthony Kennedy struck a note of redemptive constitutionalism in an opinion expanding the right of criminal defendants to challenge racial bias in juries: "It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). Kennedy does not state that it already *is* the heritage of the United States to reject such racial subordination, nor that we must *deny* our heritage because of the deep roots of racial subordination within it. *Id.* Rather, he calls for the United States to *become* a nation with a heritage—an identity rooted (perhaps paradoxically) in the past—of rising above racial subordination. *Id.*

¹⁸¹ The awareness of the determining force of such contingencies, even on one's own values and beliefs, is what Rorty called being an "ironist." See RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 73 (1989). Just as Balkin maintains faith in the Constitution despite his awareness of constitutional historicism, Rorty maintains an arguably faith-like commitment to his ideals of social solidarity, artistic self-creation, and the American project of Dewey and Whitman despite conceiving of himself as an ironist. *Id.* Again, the rational (or irrational) structure of the commitment loosely resembles that of Kierkegaard's knight of faith. Cf. Barry Allen, *Ironist Life*, NOTRE DAME PHIL. REV. (Feb. 9, 2017), <http://ndpr.nd.edu/news/ironic-life/> (reviewing RICHARD J. BERNSTEIN, *IRONIC LIFE* (2016)) (noting that "Rorty's liberal ironist is an American version of Kierkegaard's knight of faith," a figure who does not stop with the "[r]omantic ironist" at "[a]bsolute negativity," but instead commits herself to her contingent ideals with "[e]thical passion"). *Id.*

¹⁸² Compare BALKIN, *CONSTITUTIONAL REDEMPTION*, *supra* note 75, at 25, 102, with RORTY, *ACHIEVING OUR COUNTRY*, *supra* note 175, at 119.

¹⁸³ In fact, since the election of President Donald Trump, Rorty's book has drawn renewed attention for a prophetic passage in which he suggested that white working class voters, abandoned to economic stagnation, might one day turn to a strongman for revenge against contemptuous elites. See Jennifer Senior, *Richard Rorty's 1998 Book Suggested Election 2016 Was Coming*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/2016/11/21/books/richard-rortys-1998-book-suggested-election-2016-was-coming.html>.

¹⁸⁴ I use the term "evils" to highlight the extent to which a redemptive faith can make room for, in theory, any act, any atrocity, no matter how abhorrent—from colonial genocide to slavery. The

to be true, nor a naive or hypocritical American exceptionalism, nor a Whiggish belief in the inevitability of progress. Just as Balkin's constitutional faith recognizes itself to be an expression of faith rather than a disinterested historical description, so Rorty's invocation of James Baldwin's plea does not depend on the illusion that the ideals they want to achieve were shared by slaveowners two centuries before.

IV. CONCLUSION

Leibniz had a dream that law could become, in the words of one historian, a "deductive science on the model of classical geometry" and that legal reasoning could be made to "follow the deductive, demonstrative model used in geometric proofs."¹⁸⁵ From his student Christian Freiherr von Wolff, to Friedrich Carl von Savigny, to John Austin, to Christopher Columbus Langdell, and beyond, the formalist dream of producing legal certainty through deduction has captivated the minds of legal theorists.¹⁸⁶ If law were a kind of science or

greater the sin, the more powerful the need for redemption. Far from inviting complacency or self-congratulation, as critics of redemptive constitutionalism might argue, the redemptive project demands action, and is also entirely compatible with a recognition that the ideal may never be achieved. As Balkin's and Rorty's work shows, the redemptive project need not entail a commitment to the uncritical "American creedalist" claims of, for example, SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* (1983), which argues that "most elements in American society" "[s]ince the late eighteenth or early nineteenth century" have supported an "American Creed" whose "central elements have changed relatively little" and include "liberty, equality, individualism, democracy, and the rule of law under a constitution," as "set forth succinctly in the Declaration of Independence." *Id.* at 14. Redemptive nationalist projects, whether focused on the Constitution like Balkin's or more generally on American identity like Rorty's, are entirely compatible with an empirical, historical recognition that the central ideological commitments of various parts of American society have often included elements outside of Huntington's list, including, for example, white supremacy, and have often changed over the last two centuries. It is Balkin's and Rorty's recognition that *the kinds of claims they are making* regarding the contents of the Constitution or of "American identity" are not simply neutral, dispassionate, uncommitted observations that marks their projects as non-fundamentalist.

It is true, as Aziz Rana suggests in *Freedom Struggles and the Limits of Constitutional Continuity*, 71 MD. L. REV. 1015, 1020–21 (2012) (citing MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 38–40 (1993)), that there are risks to the kind of immanent critique that redemptive constitutionalism necessarily entails. But the risks hardly seem greater than those involved in the available alternatives, including Rana's proposal to channel progressive political energies toward the radical external critique of American identity as inherently settler colonialist, and of American history as inexorably tragic. *See id.* at 1046–51; AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 3 (2014). Even if one were to share the radical Left's often expansive faith in the emancipatory and egalitarian potential of spontaneous popular democracy, it is difficult to imagine a strategy of harsh condemnation from an alien perspective, delivered in a litany of hopelessness, proving effective in any actually existing political culture.

¹⁸⁵ M. H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 100 (1986).

¹⁸⁶ *Id.* at 102–21.

geometry, then legal reasoning might escape the corrupting influence of the personal morality or political ideology of judges. The Justices of our Supreme Court could function as mere umpires, calling balls and strikes. They could arrive at their conclusions based simply on what the law *is*, not on what they believe it ought to be. Law could be kept free from the contamination of politics, thereby securing the validity and legitimacy of the rule of law lying at the foundation of the liberal state.

This Article has assumed that legal realists and other critics of “the abuse of deduction”¹⁸⁷ are correct in concluding that law is not and cannot be a deductive science in this sense. A system of laws stated in natural language cannot function as a logically perfect deductive system. Nor can the norms of the relevant interpretive communities, nor the underlying spirit, purposes, or norms of the legal order, entirely supply what is lacking in the determinacy of raw natural language legal rules.

There are many possible ways to reject the assumption that the rule of law, in the senses that matter to contemporary opponents of arbitrary, unequal, and authoritarian rule, requires that the law be strictly quarantined from the prescriptive commitments of its interpreters.¹⁸⁸ Indeed, if the rule of law requires that interpreters of the law derive its contents entirely without regard for their views of what the law should be, then the rule of law has never existed and will never exist. So long as appeals to the law continue to be made, it is practically unavoidable that those appeals will be presented and settled through what this Article has termed *legal discourse*, a distinctive social practice combining descriptive and prescriptive reasoning but whose conclusions are stated simply as descriptions of what the law is.¹⁸⁹ Nothing prevents us from viewing such discourse, atheistically, as merely a form of mystification intended to obscure from disputants the role of the adjudicator in constructing the authority to which she appeals. The purpose of this Article has been to suggest, however, that an alternative view is at least conceptually possible.

¹⁸⁷ Kennedy, *The Hermeneutics of Suspicion*, *supra* note 61, at 99 (citing FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (1899)).

¹⁸⁸ The critical liberal political theorist Judith Shklar's writings on law provide one example. See, e.g., JUDITH N. SHKLAR, *Political Theory and the Rule of Law*, in POLITICAL THOUGHT AND POLITICAL THINKERS 21, 31 (1998) (presenting courts and lawyers as “parts of a single political continuum on which other public agencies are also placed according to their degree of court-likeness,” and noting that courts may nonetheless “have their own characteristic procedures or roles” which need not “constitute some sort of fraudulent charade to hide the actuality of oppression”); accord JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS x–xii (1986).

¹⁸⁹ Indeed, this discursive structure may arise in any social practice—including explicitly religious ones—in which an interpreter has responsibility for specifying the contents of a logically imperfect source of authority, where different specifications will lead to outcomes favored by different interests. The interpreter will have an incentive to enhance the legitimacy of her declared conclusion by presenting it as merely a description of what the authority decrees, uninfluenced by her views of what should be the case.